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No. 07-

IN THE
SUPREME COURT OF THE UNITED STATES

National Parks Conservation Association
and Sierra Club,
Petitioners,
v.
Tennessee Valley Authority,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners filed this Clean Air Act enforcement action in district court, alleging (in accord with the position of the Environmental Protection Agency), that respondent Tennessee Valley Authority (TVA) had violated the Act by making major modifications to its coal fired electric generating unit without first obtaining a permit. The Eleventh Circuit, in a decision that conflicts with decisions of other Circuits, ruled that the suit was barred on statute of limitations and notice grounds. The questions presented are:

1. Whether petitioners' claims for civil penalties under the Clean Air Act's New Source Review program were time-barred under 28 U.S.C. 2462, a general statute of limitations that applies to proceedings for enforcement of civil fines, penalties, or forfeitures,

2. Whether, assuming the New Source Review claims for civil penalties were time-barred, petitioners' claim for injunctive relief was therefore precluded by operation of the "concurrent remedy" doctrine, and

3. Whether National Parks Conservation Association (NPCA) and Sierra Club gave inadequate notice of their New Source Performance Standards claim.

PARTIES TO THE PROCEEDINGS

Petitioners NPCA and Sierra Club were plaintiffs in the district court and appellants in the court of appeals. Defendant TVA was appellee in the court of appeals.

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JURISDICTION

The court of appeals entered judgment on October 4, 2007. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. 2462 provides that "an action, suit or proceeding for the enforcement of any *civil fine, penalty, or forfeiture*, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." (Emphasis added). Other pertinent statutes and regulations are reproduced in the Appendix at App. 153a-180a.

INTRODUCTION

The 1970 and 1977 amendments to the Clean Air Act (CAA) exempted existing stationary sources from various core requirements of the Act – including the New Source Performance Standards (NSPS), the Prevention of Significant Deterioration (PSD), and the Nonattainment New Source Review (NNSR) programs – unless and until the owners of those sources engaged in a "modification" of the facilities. *See Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423, 1429 (2007). In this CAA citizen suit, petitioners NPCA and Sierra Club allege that TVA, beginning in 1982, ended the grandfathered status for Unit 5 of its Colbert plant with a $57 million, 13 month modification. (Doc 80 ¶ 22). Because TVA is operating Unit 5 out of compliance with these programs, petitioners allege that TVA is illegally emitting tens of thousands of tons of sulfur dioxide (SO_2), nitrogen oxides (NO_x), and particulate matter (PM) each year. (Doc 80 ¶ 3). Petitioners seek an injunction to bring TVA's operations into compliance with these three CAA programs, thereby significantly reducing TVA's harmful emissions.

Despite finding that the doctrine of sovereign immunity bars petitioners from obtaining any relief at law, the Eleventh Circuit held that 28 U.S.C. 2462, a limitations provision that applies only to actions for "the enforcement" of civil fines, penalties, or forfeitures, also barred petitioners' equitable claims for injunctive relief. In so doing, the Eleventh Circuit held directly contrary to a decision by the Sixth Circuit involving these same parties. In *NPCA v. TVA*, 480 F.3d 410 (6th Cir. 2007), *reh'g denied*, 2007 U.S. App. LEXIS 21725, the Sixth Circuit recognized that under

the CAA, citizens may bring an action for a source owner's failure to have a permit as as a condition of operations and that TVA is violating such a requirement by operating without a PSD permit. The Sixth Circuit also held that operating without a BACT emission limit is separately actionable. Such an operational violation "manifests itself anew each day a plant operates." *Id.* at 419. Thus, the Sixth Circuit held that 28 U.S.C. 2462 does not bar a CAA citizen suit regarding TVA's PSD violations in Tennessee. The Eleventh Circuit's decision not to follow the Sixth Circuit's lead stemmed from a fundamental failure to recognize that NSR permits, although they must be obtained prior to construction, actually govern operations and that operating without them violates the Act, as manifested through the Alabama SIP.

Even if the Eleventh Circuit was correct in holding that section 2462 barred petitioners' penalty claims, it contravened the plain language of that section by ruling that it also barred petitioners' injunctive relief claims. The Eleventh Circuit's judicial redrafting of section 2462 supplants the CAA's carefully crafted remedial scheme that allows citizens to secure injunctions of ongoing violations. The Eleventh Circuit based its ruling on the rarely-applied concurrent remedy doctrine, and its sweeping application of that doctrine contravenes the settled precedent of this Court. *See Russell v. Todd*, 309 U.S. 280 (1940). The concurrent remedy doctrine is a narrow exception to the general rule that statutes of limitations do not apply in equity, *Holmberg v. Armbrecht*, 327 U.S. 392 (1946). The concurrent remedy doctrine applies when a court is sitting in "concurrent" equitable jurisdiction, but the doctrine does not apply to claims brought in

"exclusive" equitable jurisdiction. Claims for injunctive relief arise only in exclusive equitable jurisdiction, even when legal remedies are also available. 1 Pomeroy's Equity Jurisprudence (Pomeroy's), § 138-39 (5th ed. 1941). Because petitioners' claims for injunctive relief arose in exclusive equitable jurisdiction, they could not be barred under the concurrent remedy doctrine.

Finally, in a decision that conflicts with the applicable regulation, 40 C.F.R. 54.3(b), the Eleventh Circuit upheld the dismissal of petitioners' claim regarding TVA's NSPS violations at Colbert on notice grounds. The court below erred, however, because it did not base its assessment of the adequacy of the notice letter on an evaluation of the pleadings.

STATEMENT OF THE CASE

Statutory and Regulatory Background. Congress adopted the Clean Air Act Amendments of 1970 "to guarantee the prompt attainment and maintenance of specified air quality standards." *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 540 U.S. 461, 469 (2004)(*ADEC*). To achieve this goal, the 1970 legislation directed EPA to develop national technology-based standards intended to "force" the development of new and better control technologies. *See Union Elec. v. EPA.*, 427 U.S. 246, 257 (1976). The New Source Performance Standards (NSPS) require new and "modified" sources to meet technology-based standards developed by EPA and applicable to entire categories of equipment. 42 U.S.C. 7411.

The 1970 Amendment also directed EPA to establish National Ambient Air Quality Standards (NAAQS) for

air pollutants at a level requisite to protect human health and the environment. 42 U.S.C. 7409. States are authorized to establish state implementation plans (SIPs) to achieve and maintain the NAAQS. *Id.* 7410.

In 1977, Congress comprehensively amended the Act, adding two new permitting programs. One, the statutory Prevention of Significant Deterioration (PSD) program, 42 U.S.C. 7470-7479, ensures that air quality in areas meeting the NAAQS (attainment areas) will not degrade. *ADEC*, 540 U.S. at 470-71. Under the PSD program, administered in many states, including Alabama, through the SIP, a new or modified facility cannot obtain a permit unless it demonstrates that it will not cause or contribute to a violation of a NAAQS. 42 U.S.C. 7475(a)(3). Also, the permit must include an emission limit, known as Best Available Control Technology (BACT). 42 U.S.C. 7475(a)(4), 42 U.S.C. 7479(3). The CAA defines BACT not as "technology," but rather as an emission limitation established by the State through a "case-by-case" process. 42 U.S.C. § 7479(3).

The other permitting program Congress added in 1977, the nonattainment new source review (NNSR) program, is the analog to the PSD program in areas failing to meet the NAAQS (nonattainment areas). In these areas, a facility cannot obtain a permit unless it obtains "offsets" to ensure that overall, the facility will not cause an increase in emissions. 42 U.S.C. 7503(a)(1). Furthermore, Congress requires such facilities to comply with the lowest achievable emission rate (LAER), which like BACT, is not defined in terms of technology, but rather as an emission limitation. 42 U.S.C. 7503(a)(1) and 7501(3). When referred to together, PSD and NNSR permits are known as "new

source review" (NSR) permits.

Each of these programs have "modification" provisions requiring that if an owner or operator makes a physical change to a unit that results in an emissions increase, the unit becomes subject to the program's requirements. *See* 40 C.F.R. § 60.14 (NSPS modification); Alabama Air Pollution Control Commission (AAPCC) Reg. 16.3.2(b)(4) (1979) (definition of "major modification" in the NNSR provision that applied at the time), App. 177a; AAPCC Reg. 16.4.2(b)(1)(definition of "major modification" in the PSD provision applicable at the time), App. 178a. As discussed below, Petitioners allege that TVA's 1982-83 rehabilitation project at Colbert 5 caused emissions increases for sulfur dioxide (SO_2), nitrogen oxides (NO_x), and particulate matter (PM). The parties agree that at the time of the project, the plant was located in a non-attainment area for SO_2. (Doc 80 ¶ 19, Doc 83 ¶ 19). Accordingly, the NNSR program governs Colbert 5's emissions of SO_2, while the PSD program governs the emissions of NO_x, and PM. In addition, the 1982-83 rehabilitation project was a reconstruction and modification of Unit 5, making the unit subject to the NSPS regulations for all three pollutants.

Certain consequences followed from the triggering of each of the programs. Under the NSPS program, a modified source becomes subject to a set of emission limitations, such as a requirement to control SO_2 emissions by 90 percent. *See* 40 C.F.R. § 60.43Da(a).

Under the PSD program as implemented in Alabama, modified facilities must obtain an "Air Permit" containing PSD requirements, Ala. Admin. Code Rule 335-3-14-.01(1)(a), App. 179a, and it is illegal to operate without such an Air Permit even if a

source began operating without one. Ala. Admin. Code Rule 335-3-14-.01(1)(c), App. 180a.

Significantly, even though what are now called "Air Permits" in Alabama were known, prior to 1985, as "construction permits" and "operating permits," the Alabama SIP prohibited sources from operating without either. Under pre-1985 SIP Rule 16.1.1, App. 175a-76a, one could not operate a source without an operating permit, one could not obtain an operating permit without a construction permit, and one was required to obtain a construction permit for every modification. Thus, the change of the permitting names in 1985[1] did nothing to change the fundamental requirement that upon making a major modification, one could not operate without a permit containing NSR operational requirements – in particular, emission limits.

Not only does the Alabama SIP prohibit TVA from "presently operating" Unit 5 without an Air Permit related to the 1982-83 modification, but also it prohibits TVA from operating without the emission limitation known as BACT:

> A major modification shall apply BACT for each pollutant subject to regulation under the CAA for

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[1] *See* June 22, 2005 Declaration of Ronald Gore, Chief of the Air Division for the Alabama Department of Environmental Management, explaining that prior to 1985, there were three types of air quality permits in Alabama: construction permits, temporary permits to operate, and permits to operate. Doc 104 – Part 5(Exhibit C) – ¶ 4). In 1985, however, Alabama replaced that tripartite system with a system in which all permits became Air Permits. *Id.* Furthermore, all existing permits to construct and permits to operate became "Air Permits" by operation of law. *Id.* ¶8. *See also* 50 Fed. Reg. 34804 (August 28, 1985)(EPA FR notice approving the change).

which it would result in a significant net emissions increase at the source. . . .

Ala. Admin. Code Rule 335-3-14-.04(9)(c), App. 180a.

With respect to the NNSR permits, the Clean Air Act makes clear that such permits govern not only initial construction, but also plant operation: nonattainment plan provisions "shall require permits for the construction and ***operation*** of new or modified major stationary sources anywhere in the nonattainment area." 42 U.S.C. 7502(c)(5) (emphasis added).[2] Not surprisingly then, although the substantive requirements for permits in the Alabama SIP differ for PSD and NNSR, *compare* Ala. Admin. Code Rule 335-3-14-.04 (PSD) *with* Rule 335-3-14-.05 (NNSR), the requirements discussed above regarding the necessity of an Air Permit in order to operate after a modification apply to both PSD and NNSR permits.

Factual Background. TVA is the nation's largest public power company. (Doc 116 – Fact ¶ 50).[3] It owns and operates 11 coal-fired power plants consisting of 59 units (*Id.* ¶ 51), including one in Colbert County, Tuscumbia, Alabama known as the Colbert Plant. (*Id.* ¶ 2). The Colbert Plant combusts coal in five boilers. This case involves Unit 5. (*Id.* ¶ 4), which has no SO_2 control equipment. (*Id.* ¶ 49). Unit 5 emits a

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[2] Prior to the 1990 CAA Amendments, Pub. L. 101-549 (Nov. 15, 1990), this provision was codified at 42 U.S.C. 7506(b)(6).

[3] "Doc" citations are to the documents in the District Court record. Unless otherwise indicated, the exposition of the facts in this section is undisputed based upon Petitioners' recitation of proposed undisputed facts in its brief in support of its motion for partial summary judgment on applicability (Doc 116) and TVA's response (Doc 152).

tremendous amount of air pollution. For instance, in 2003, Unit 5 emitted over 35,000 tons of SO_2 and over 5,850 tons of NO_x. (Doc 177 – pg 6). Congress considers a power plant to be a "major emitting facility" if it emits over 100 tons of any air pollutant. 42 U.S.C. § 7479.

Construction of Unit 5 began in 1961 and the unit was designed to produce 500 megawatts (MW) of electricity. (Doc 116 ¶ 11). The boiler was inadequately designed, however, (*Id.* ¶ 12), and a number of significant problems became evident very early in the unit's life. (*Id.* ¶ 13). By 1978, TVA decided to address and correct Unit 5's original design deficiencies. (*Id.* ¶ 15). R. N. Kennedy, Chief of TVA's Power Supply Planning Branch concluded in 1979 that unless TVA undertook a "complete rehabilitation" of Unit 5, TVA could not have kept the unit in service for long and would have been forced to put the unit "in shutdown mode." (*Id.* ¶ 25). The Unit 5 project cost TVA $57 million and kept the unit out of service for 13 months, increasing the unit's pre-project capacity by 100 megawatts. *Id.* ¶¶ 19-23. Because of this capacity increase, Petitioners allege that the project increased emissions on an hourly and annual basis, thereby triggering applicability of the NSR and NSPS programs.(Doc 80 ¶¶ 71, 78, 83). Petitioners also allege that TVA's operation of Unit 5 violates a number of NSPS requirements including the requirement to control SO_2 with a scrubber. *Id.* ¶¶ 85-91.

Procedural Background. In 1999, EPA found that TVA had undertaken 14 projects at its coal-fired fleet that violated NSR or NSPS requirements, or both, and consequently, EPA issued TVA an Administrative Compliance Order. EPA's 1999 finding covered the

Unit 5 project addressed in this case. *See TVA v. United States EPA*, 278 F.3d 1184 (11th Cir. 2002), *opinion withdrawn in part by, TVA v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), *cert. denied*, 541 U.S. 1030, 124 S. Ct. 2096 (2004).

Concerned that EPA's chosen enforcement option might fail, NPCA sent out a notice letter on October 30, 2000. App. 133a. Sierra Club followed with a notice letter on December 13, 2000, App. 151a. The two groups filed their complaint in this case in February 2001, and amended it twice. (Docs 1, 10, and 80).

EPA's enforcement effort against TVA suffered a major blow when the Eleventh Circuit found EPA's Administrative Compliance Order unconstitutional on procedural due process grounds. *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), *cert. denied*, 541 U.S. 1030 (2004). EPA had chosen to issue TVA an administrative order rather than sue TVA in federal court because of concerns by the Department of Justice that the Constitution prohibits the government from suing itself. 278 F.3d at 1193-94. Consequently, though the Eleventh Circuit invited to EPA to take action against TVA in district court, EPA has refused, leaving petitioners to press on alone.

While the EPA-TVA litigation proceeded through the courts, this case was stayed for almost three years (Docs 22 and 43). Once this case began moving again, the district court granted Petitioners' motion for partial summary judgment on standing, and TVA did not appeal that ruling. (Doc 202). Petitioners also moved for partial summary judgment to establish applicability of the NSPS and NSR programs. (Doc 107). TVA moved to dismiss the NSR-related claims on statute of limitations grounds (Doc 99) and the NSPS-

related claims on notice grounds. (Doc 96). In a series of overlapping orders and opinions, the district court ultimately granted TVA's motions and denied Petitioners' motion for partial summary judgment on applicability.

Petitioners then appealed the district court's rulings regarding the statute of limitations, notice, and applicability. The Eleventh Circuit affirmed the district court's rulings on statute of limitations and notice and found that it had no jurisdiction to review the district court's denial of the applicability motion. App. 31a.

More specifically, the Eleventh Circuit ruled that regardless of TVA's sovereign immunity, petitioners could not obtain civil penalties for TVA's alleged PSD and NNSR violations because those claims first accrued in 1982-83. App. 11a. The court rejected petitioners' argument that TVA's operation without an Air Permit related to the 1982-83 modification constituted a current violation of the SIP for three reasons. First, the court stated that it was not clear that NPCA and Sierra Club had alleged a violation of the current SIP rules. App. 20a. Second, the court found that there was no indication that Alabama intended the 1985 SIP rule changes, converting "construction permits" and "operating permits" into Air Permits, to be retroactive. App. 20a. Finally, the court noted that TVA has an "operating permit" from the State of Alabama. Therefore, the Eleventh Circuit rejected petitioners' contention that TVA is operating without an "Air Permit" as an impermissible "collateral attack" on a permit. App. 21a.

The Eleventh Circuit also rejected petitioners' argument that the Alabama SIP imposes an ongoing

obligation upon TVA to operate Unit 5 with BACT emission limits, regardless of the permitting scheme. App. 18a. The court took note of the Sixth Circuit's ruling on the issue, but recognized a distinction between the Alabama and Tennessee SIP rules on this point because the Tennessee SIP provided a mechanism for obtaining a construction permit after construction had commenced, and the court could not find a similar provision in the Alabama SIP. App. 19a. The Eleventh Circuit also specifically rejected the Sixth Circuit's conclusion that the Tennessee BACT regulation by itself created an ongoing obligation to apply BACT. App. 18a, n. 2.

The Eleventh Circuit then went on to rule that since 28 U.S.C. 2462 barred petitioners' legal claims, petitioners' claims for injunctive relief were barred under the concurrent remedy doctrine. App. 24a-25a ("Thus, we have considered whether and to what extent the five-year statute of limitations and the concurrent remedy doctrine bar the legal and equitable New Source Review claims National Parks and Sierra Club assert in this case, and we conclude that the district court correctly dismissed those claims.").

Finally, the court ruled that petitioners' NSPS claim was properly dismissed because their pre-suit notice letter was impermissibly overbroad. App. 29a-30a.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED TO ADDRESS THE WIDESPREAD, DISPARATE, AND OFTEN ERRONEOUS APPLICATION OF 28 U.S.C. 2462 IN ENVIRONMENTAL ENFORCEMENT CASES.

The court of appeals held that 28 U.S.C. 2462 applies to bar Petitioners' NSR claims because they did not file suit within five years of when TVA commenced construction on the modification. App. 11a.

Faced with almost the same parties and an almost identical fact pattern (involving a different TVA plant, Bull Run) the Sixth Circuit found otherwise. *NPCA v. TVA*, 480 F.3d 410, 419 (6th Cir. 2007) ("TVA's subsequent and continuing failures (1) to apply BACT and (2) to obtain a construction permit containing emissions limitations under the Tennessee SIP's PSD provisions are actionable."), *reh'g denied*, 2007 U.S. App. LEXIS 21725.

This split between the Sixth and Eleventh Circuits reflects a larger conflict involving dozens of decisions about the proper application of 28 U.S.C. 2462 in the context of environmental enforcement. Cases holding that 28 U.S.C. 2462 would not bar the imposition of a penalty in the CAA permitting context include *United States v. Marine Shale Processors*, 81 F.3d 1329, 1355-57 (5th Cir. 1996); *United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 651 (M.D.N.C. 2003), *aff'd* 411 F.3d 539 (4th Cir. 2005), *rev'd on other grounds in Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423 (2007); *United States v. American Elec. Power Serv. Corp.*, 137 F. Supp. 2d 1060, 1066 (S.D. Ohio 2001); *Sierra Club v. Dayton Power & Light,*

2:04-CV-905, slip op. at 5 (S.D. Ohio August 12, 2005); *United States v. Ohio Edison Co.*, 2003 U.S. Dist. LEXIS 2357 (S.D. Ohio Jan. 17, 2003);[4] *Detroit Edison Co. v. Michigan Dep't of Envt'l. Quality*, 39 F. Supp. 2d 875, 877 (E.D. Mich. 1999); *Idaho Conservation League v. Boer*, CV-04-250-S-BLW, slip op. at 15 (D. Idaho Sept. 27, 2004); *United States v. Titanium Metals Corp.*, CV-S-98-682, slip. op. at 1-2 (D. Nev. Sept. 21, 1998).

Cases finding that 28 U.S.C. 2462 bars the assessment of a civil penalty when construction commenced more than five years before the complaint was filed include *United States v. Westvaco Corp.*, 144 F. Supp. 2d 439, 443 (D. Md. 2001) ; *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650, 661 (W.D.N.Y. 2003); *United States v. Illinois Power Co.*, 245 F. Supp. 2d 951, 957 (S.D. Ill. 2003); *United States v. Southern Ind. Gas & Elec. Co.*, 2002 WL 1760752, at *4 (S.D. Ind. 2002); *United States v. Brotech Corp.*, 2000 WL 1368023, at *3 (E.D. Pa. 2000); *United States v. Campbell Soup Co.*, 1997 WL 258894, at *2 (E.D. Cal. 1997); *Ogden Projects, Inc. v. New Morgan Landfill Co.*, 911 F. Supp. 863, 876 (E.D. Pa. 1996); *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122, 1130 (D. Colo. 1987).

The question of the proper application of 28 U.S.C. 2462 has also arisen outside the CAA permitting context. *See, e.g., 3M v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994)(28 U.S.C. 2462 applies to violations of the Toxics Substances Control Act and bars the assessment of a penalty for violations that occurred outside the

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[4] *Dayton Power, Ohio Edison*, and *AEP* were all decided by the same district court judge, Edmund A. Sargus, Jr.

limitations period, but not violations that occurred within the period); *Newell Recycling Co. v. United States EPA*, 231 F.3d 204 (5th Cir 2000)(under Toxics Substances Control Act, 28 U.S.C. 2462 did not bar imposition of civil penalty even though excavation and stockpiling of PCB laden soil occurred more than 5 years before complaint because stockpiled soil remained); *United States v. Reaves*, 923 F. Supp. 1530 (M.D. Fla. 1996)(ruling, in enforcement action under the Clean Water Act and the Rivers and Harbors Act, that 28 U.S.C. 2462 did not bar the civil penalties for defendant's unpermitted discharge of dredged or fill materials into wetlands as long as the fill remained).

Because of the plethora of litigation involving the application of 28 U.S.C. 2462 and the varied, inconsistent results, the Court should grant review of the Eleventh Circuit's decision, which, as shown below, was erroneous .

A. In Applying 28 U.S.C. 2462 in the NSR Context, the Court Below, like Some other Lower Courts, Relied on a False Distinction Between "Construction" and "Operating" Permits.

The court of appeals, like some other federal courts, relied upon a fundamentally mistaken legal framework for evaluating the applicability of 28 U.S.C. 2462 in cases involving alleged failures to obtain permits required under the NSR programs.

The central error underlying these decisions is a false distinction between "preconstruction" permits and "operating" permits. The Eleventh Circuit here, and other courts that have barred the imposition of civil penalties in NSR cases, have reasoned that: (1) PSD permits must be obtained before construction; (2) the Act specifically prohibits construction without that

permit; (3) the illegal "act" is therefore the commencement of construction without a permit, and (4) the statute of limitations begins to accrue at the commencement of construction. These courts also acknowledge that if "operation" without a permit was illegal, then there would be no statute of limitations problem. For example, the court below stated acknowledged that there would be no statute of limitations problem if a source commits "a discrete violation every time it operates." App. 17a. As the Sixth Circuit put it, the violation "manifests itself anew each day." 480 F.3d at 419.[5] *See also Illinois Power*, 245 F. Supp. 2d at 957 ("Preconstruction permits have a finite existence while operational permits can be ongoing violations.").

The Eleventh Circuit erred because it concluded that if a permit governs construction, it does not also govern operation, or in other words, while it is illegal to commence construction without a preconstruction permit, it is not illegal to ***operate*** without one. The Fifth Circuit recognized the fallacy of this thinking: "[t]he CAA statutory scheme contemplates at least two different types of air permits unhappily named 'preconstruction permits' and 'operating permits, with confusion easily resulting from the fact that preconstruction permits often include limits upon a

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[5] This Court has recognized that a statute of limitations will not bar a claim when a series of repeated, wrongful events has occurred within the limitations period. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)("Each discrete discriminatory act starts a new clock for filing charges alleging that act.").

source's operations." *Marine Shale,* 81 F.3d 1355-56. With this in mind, the *Marine Shale* court found the notion that 28 U.S.C. 2462 would bar the imposition of civil penalties because the unpermitted construction had begun more than five years before the complaint "frivolous." *Id.* 1357. *See also American Elec. Power.*, 137 F. Supp. 2d at 1066 (It is "illogical to conclude that a defendant may only be held liable for constructing a facility, rather than operating such facility, without complying with the [PSD] permit requirements.").

Review of the plain and unambiguous language of the CAA's NSR program reveals that NSR permits, although properly obtained prior to construction, actually govern source operation and are required "as a condition of operations," 42 U.S.C. 7604(f)(4), or more colloquially, "operating permits." The CAA's text emphatically demonstrates that Congress intended PSD permits under 42 U.S.C. 7475 to restrict on-going operations post-construction. Section 7475(a)(1) provides that PSD permits must contain "emission limitations." Section 7475(a)(4) specifies that PSD permits must require facilities to utilize "best available control technology" (BACT) to reduce their air emissions once in operation, and BACT is *defined* as an "emission limitation." 42 U.S.C. 7479(3). Section 7475(d) provides that PSD permits must include elaborate, specific limitations on air pollution emissions from operating facilities. Section 7475(e) further specifies provisions that PSD permits must have for monitoring the emissions of operating facilities. Similarly, with respect to NNSR permits, Congress requires that SIPs contain provisions that "require permits for the construction and ***operation*** of new or modified major stationary sources anywhere in

the nonattainment area." 42 U.S.C. 7502(c)(5) (emphasis added).[6] The statutory text therefore leaves no doubt that PSD permits govern source operation.[7]

The Eleventh Circuit's basic misunderstanding of the CAA permitting regime rested in part on the panel's myopic focus on 42 U.S.C. 7604(a)(3). That subsection authorizes citizens to take action "against any person who proposes to ***construct or constructs*** any new or modified major emitting facility without a permit." (emphasis added) However, contrary to the court's inference that *only* unlawful construction is actionable, subsection (a)(1) expressly authorizes citizens to take action against anyone who is violating "an emission standard or limitation," and that phrase is specifically defined to include "any requirement to obtain a permit as a *condition of operation*." 42 U.S.C. 7604(f)(4) (emphasis added). Thus, the Eleventh Circuit's approach defies the Act's plain language.

Requirements to obtain NSR permits are

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[6] *See Duke* 278 F. Supp. 2d at 651 ("[B]ecause the PSD permitting provisions provide both preconstruction obligations and subsequent obligations on operations, Duke Energy's alleged violation of failing to undergo the PSD permitting process does not terminate upon the completion of construction activity.").

[7] That NSR permits constrain source operation, and not just construction, is further confirmed by the addition to the Clean Air Act in 1990 of the Title V operating permit program. Title V permits consolidate all CAA permitting requirements into one place and do not create new substantive requirements. *See* Final Operating Permits Rule Preamble, 57 Fed. Reg. 32250 (1992). Thus, a source cannot obtain operational BACT or LAER emission limitations through the Title V permitting process. It must obtain an NSR permit first. Furthermore, NSR permits, once issued, never expire, unless rescinded. *See* 40 C.F.R 52.21(w).

"requirements to obtain permits as a condition of operation" because, as shown above, these permits must contain conditions that govern operation. Indeed, the BACT or LAER provisions in NSR permits only take effect once a source has begun operation. Subsection 7604(f)(4) applies to "any" requirement to obtain a permit as a condition of operation. Such requirements can be stated in a number of ways. Such a requirement might be worded: "thou shall not operate without permit X," or one might also say, "if thou has made a major modification, thou shall obtain permit X." Both forms require permit X to be obtained, and if permit X must contain operational restrictions (and NSR permits must), then both forms are "requirements to obtain permits as a condition of operations."

Thus, it does not matter whether the NSR program is implemented through a two-step permitting process such as the one now in Tennessee (where the result of the extensive process for establishing BACT, *see ADEC*, 540 U.S. 461, is first incorporated into a "preconstruction" permit and later poured over to an "operating" permit) or whether the program is implemented though a one-step permitting process such as the one now in Alabama, where the owner need only apply for an Air Permit. Under either scenario, the bottom line is that the owner of a new or modified source must obtain these permits, and these permits must contain operational restrictions. Thus, operating without such a permit is violating a requirement to have a permit as a condition of operation.

Not surprisingly, the prohibition against operation without an NSR permit is actually explicitly stated in the Alabama SIP that applies in this case. Ala. Admin.

Code Rule 335-3-14-.01(1)(a), App. 179a, provides, *inter alia,* that any person altering equipment that may increase the emission of air contaminants must obtain an "Air Permit." Subsection (c) provides that any equipment described in Subsection (a)(and this would include sources like Unit 5 that have had modifications that have increased emissions) that is "presently operating . . . without an Air Permit may continue to operate . . . only if its owner or operator obtains an Air Permit." App. 180a. Thus, one of the remedies Petitioners seek through this suit is for TVA to apply for and obtain an "Air Permit" from the State of Alabama for the 1982-85 modification.

The Eleventh Circuit disregarded the import of this section because it was not clear that Petitioners had alleged a violation of the current rules. Review of the Second Amended Complaint shows, however, that plaintiffs alleged the following:

> Since 1982, TVA has ***operated*** the Colbert Plant ***without a PSD permit*** . . . . Accordingly, TVA has violated and ***continues to violate*** the Act and ***the Alabama SIP*** by making this "modification" and ***operating*** the Colbert Plant power plant ***without obtaining a PSD permit***.

(Doc 80 ¶¶ 71-72 (emphasis added)). *See also id. ¶¶* 79-80. Clearly, the complaint spells out that Citizens are alleging a violation of the current SIP. The complaint is not the place to set out specific statutory or regulatory citations. *See Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1078 (7th Cir. 1992)("Instead of asking whether the complaint points to the appropriate statute, a court should ask whether relief is possible under any set of facts that could be established consistent with the allegations." *Conley v. Gibson*, 355

U.S. 41, 45-46 (1957).").

The Eleventh Circuit also ruled that the current SIP's restriction on operating without an Air Permit does not cover TVA's modification because "[t]here is no indication that the 1985 amendments were to apply retroactively, reviving TVA's obligation to obtain a preconstruction permit specifying emission limitations." App. 20a-21a These 1985 amendments eliminated the construction permit/operating permit dichotomy and made all permits "Air Permits" by operation of law. *See* 50 Fed. Reg. 34804 (Aug. 28, 1985). The court of appeals focused on this point because it noted that the Tennessee SIP contains a specific provision that allows sources who have skipped out of the preconstruction permitting process to go back and get a preconstruction permit once operation has begun, but it could not find an analogous provision in the Alabama SIP. App. 19a.

In fact, review of the pre-1985 rules shows it has never been legal for TVA to operate without a "construction permit" containing NSR requirements. Under the pre-1985 rules, an owner had to obtain a Permit to Construct for each modification. Rule 16.1.1(a), App. 175a. Furthermore, an owner was not allowed to operate after the modification without a Permit to Operate, and one could not obtain a Permit to Operate without first obtaining a Permit to Construct. Rule 16.1.1(b), App. 176a. Finally, the same rule provided that no one "presently operating . . . without a Permit to Operate, may continue to operate." *Id.* Thus, if an owner was operating a source without a Permit to Operate associated with a modification, the rules clearly contemplated that the owner could not continue to operate without first

obtaining a Permit to Construct. The 1985 change simply changed the names of the required permits from "Permit to Construct" and "Permit to Operate" to "Air Permit."

The Eleventh Circuit also asserted that because TVA has an operating permit, this case is an invalid collateral attack on that permit. App. 21a. As the review of the regulations above shows, an owner must obtain a permit for each modification. TVA never obtained, or attempted to obtain, a permit for the 1982 modification. Thus, Petitioners are not attacking TVA for the permit that it has. They are attacking TVA for the permit it lacks. By mentioning "collateral attack," the Eleventh Circuit implies that Petitioners somehow missed out on a permitting process where they should have raised their concerns. In the case cited by Eleventh Circuit, *United States v. AM Gen. Corp.*, 34 F.3d 472 (7th Cir. 1994), there had been an opportunity for the plaintiff there, EPA, to weigh in on the issues of concern through a permitting process. Here, TVA has *never applied for a permit for the challenged modification.* Thus, there was never any "process" in which Petitioners could have participated.

As shown above, NSR permits, although they must be obtained prior to the commencement of construction, are permits that govern operation or are, in short, "operating permits." In Alabama, and everywhere else in the United States, once the requirement to obtain one of these permits attaches, one cannot operate without one. Consequently, claims for penalties for operation (without an NSR permit) within five years of the filing of the complaint, are not barred by 28 U.S.C. 2462. Clarification of these principles, recognized in some circuits and rejected by the court below and by

some other federal courts, is essential to the effective enforcement of the Clean Air Act's critically important protections for public health and welfare.

B. The Writ Should Also be Granted to Clarify the Split Between the Sixth and the Eleventh Circuits Over the Import of the Independent BACT Requirement, a Provision that is Common to All PSD Programs.

The Sixth Circuit found that regardless of the Tennessee SIP's permitting rules, the SIP independently prohibits TVA from operating the facility there (Bull Run) without the emission limitation known as BACT. 480 F.3d at 418-19. The Sixth Circuit further found that TVA's current operations violate this requirement, meaning 28 U.S.C. 2462 would not bar action for TVA's illegal operations over the five years prior to the filing of the complaint. *Id.* Although the Alabama SIP contains essentially the same provision, *see Ala. Admin Code* 335-3-14-.04(9)(c), App. 180a, the Eleventh Circuit ruled otherwise, App. 18a-19a.

That both the Tennessee and Alabama SIPs contain this provision is unsurprising given that the federal version of the PSD regulation also contains the same provision. *See* 40 C.F.R 52.21(j). This very issue has therefore been addressed in other decisions. *See, e.g., United States v. Campbell Soup Co.*, 1997 WL 258894 (E.D. Cal. 1997)(consistent with the 6th Circuit approach).

The Eleventh Circuit's decision rests on the perceived absence in the Alabama SIP of a provision present in the Tennessee SIP, namely Tenn. Comp. R. & Regs. § 1200-3-9-.01(1)(e). This provision allows an owner to obtain a "construction" permit after a source

has already been constructed without that permit. As explained above, the Alabama SIP has always had a similar regulatory mechanism. The existence of either mechanism, however, is irrelevant. As the Sixth Circuit correctly ruled, the BACT requirement in the SIP stands on its own:

> This provision, by its own terms, creates an ongoing obligation to apply BACT, ***regardless of what terms a preconstruction permit may or may not contain***. Even if TVA had obtained a construction permit that did not require BACT, such an approval "shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions under [the Tennessee SIP] and any other requirements under local, State, or Federal law." *Id.* § 1200-3-9-.01(4)(a)(5). Because the SIP requires that modified sources apply BACT, TVA may not rely on any preconstruction approval to justify its post-construction failure to comply with this provision. . . .

480 F.3d at 418 (emphasis added).

As in Tennessee, the BACT requirement in Alabama, and indeed in the federal PSD regulation, stands alone. Under the language of the SIP, each day TVA operates Unit 5 without BACT emission limits is a new violation that falls within the five year period established by 28 U.S.C. 2462. Thus, this statute of limitations is no bar to this action.

II. EVEN IF 28 U.S.C. 2462 BARS PETITIONERS' LEGAL CLAIMS, THE ELEVENTH CIRCUIT'S RULING BARRING THEIR CLAIMS FOR INJUNCTIVE RELIEF HAS NO STATUTORY BASIS AND CONTRAVENES THE DECISIONS OF THIS COURT.

Even if the Eleventh Circuit was correct that 28 U.S.C. 2462 would bar petitioners' claims for civil penalties, to the extent they had any,[8] the Eleventh Circuit misapplied this statute and contravened the decisions of this Court by ruling that section 2462 bars petitioners' claims for injunctive relief.

The Eleventh Circuit acknowledges that section 2462, by its "plain language . . . applies only to claims for legal relief; it does not apply to equitable remedies." App. 22a. Therefore, the Eleventh Circuit should have concluded, as did the court in *United States v. Hobbs*, 736 F. Supp. 1406, 1407 (E.D. Va. 1990), that section 2462 does not bar claims for injunctive relief. *See also American Elec. Power*, 137 F. Supp. 2d at 1067 ("The statute, by its terms, applies only to suits for civil penalties."); *Westvaco*, 144 F. Supp.2d at 443 n. 2

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[8] In another case between TVA and Sierra Club, the Eleventh Circuit ruled that in CAA enforcement cases, TVA has sovereign immunity from the imposition of civil penalties. *Sierra Club v. TVA*, 430 F.3d 1337, 1353-57 (11th Cir. 2005). In light of that decision, petitioners elected not to appeal the district court's decision that TVA has not waived sovereign immunity from civil penalties in this case. *See* App. 89a and App. 10a. Thus, the only reason the question of civil penalties is relevant here is because the district court and court of appeals have applied 28 U.S.C. 2462, a limitations provision that by its express terms applies to actions for civil penalties and says nothing about actions for injunctive relief, to bar citizens' claims for injunctive relief.

("The five-year statute of limitations applies to claims for civil penalties only."); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1087 (W.D. Wis. 2001) (same); *Lefebvre v. Central Maine Power Co.*, 7 F. Supp. 2d 64, 68 (D. Me. 1998)(section 2462 is inapplicable to a RCRA citizen suit seeking equitable relief); *A-C Reorganization Trust v. E.I. DuPont De Nemours*, 968 F. Supp. 423, 428 (E.D. Wis. 1997); *Catellus Dev. Corp. v. L.D. McFarland Co.*, 910 F. Supp. 1509, 1518 (D. Or. 1995). *See also Meeker v. Lehigh Valley Railroad Co.*, 236 U.S. 412, 423 (1915)(predecessor to 24620; *United States v. Perry*, 431 F.2d 1020, 1025 (9th Cir. 1970); *SEC v. Rind*, 991 F.2d 1486, 1492-93 (9th Cir.1993), *cert. denied*, 510 U.S. 963 (1993).[9]

The Eleventh Circuit's judge-made expansion of Section 2462 runs counter to congressional intent. The legislative history of the Act shows that Congress intended that the relief available through citizen suits should be co-extensive with that available through government enforcement. *See* S. Rep. No. 91-1196, p. 38 (1970)("There should be no inconsistency in the enforcement of such standards.").[10] The language of

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[9] *But see United States v. Telluride Co.*, 884 F. Supp. 404, 409-10 (D. Colo. 1995), *rev'd*, 146 F.3d 1241 (10th Cir. 1998); *United States v. Windward Properties, Inc.*, 821 F. Supp. 690, 693 (N.D. Ga. 1993); *National Parks Conservation Association v. TVA*, No. 3:01-CV-71, 2005 U.S. Dist. LEXIS 44601, at *26-28 (E. D. Tenn. March 11, 2005), *rev'd*, 480 F.3d 410 (6th Cir. 2007).

[10] Accordingly, since both the Tenth and Eleventh Circuits have held that claims for injunctive relief should not be barred, neither should actions brought by citizens. *See United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997); *Telluride Co.*, 146 F.3d at 1244-49.

the Act itself further shows that Congress viewed the availability of injunctive and civil penalty relief to be distinct. *See* 42 U.S.C. 7413 (In this section governing EPA enforcement, the Act states: "The Administrator shall, as appropriate . . . commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty . . . or both."); *see also* 42 U.S.C. 7604(a)(In the citizen suit section, the Act states: "The district courts shall have jurisdiction . . . to enforce such an emission standard or limitation . . . and to apply any appropriate civil penalties."). Despite these provisions discussing the availability of injunctive relief, the only limitations provision discussed in the Act is Section 2462,[11] which again, specifically refers only to penalty actions. Had Congress wished to time-bar separate actions or claims for injunctive relief, it would have done so. Thus, the Eleventh Circuit invented a limit on CAA remedies that has no basis in law and runs counter to Congress's intent to allow citizens to enforce the Act's protections for public health and welfare.

The basis for the Eleventh Circuit's improper judicial redrafting of section 2462 was the concurrent remedy doctrine, a doctrine rarely addressed by this Court since the advent of the modern federal rules of civil procedure and a doctrine that this Court has never applied so as to limit injunctive remedies expressly provided for by Congress as part of a comprehensive statutory scheme like the Clean Air Act. Even where it properly applies, the concurrent remedy doctrine in narrow in scope, covering claims arising in concurrent equitable jurisdiction. *See*

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[11] *See* 42 U.S.C. 7413.

Russell v. Todd, 309 U.S. 280, 287 (1940).

The Eleventh Circuit should not have invoked the concurrent remedy doctrine to supplant Congress's carefully crafted remedial scheme, one that allows citizens to secure injunctions of ongoing violations of the Act. But the court of appeals compounded its error by proceeding to adopt a sweeping version of the concurrent remedy doctrine that is inconsistent with the doctrine's traditional tenets. Under the Eleventh Circuit's approach, the doctrine applies whenever "an action at law or equity could be brought on the same facts." App. 24a. Under the proper approach, application of the doctrine turns not on whether the same facts can make out a claim at law or in equity, but rather whether the facts make out a claim arising in concurrent, rather than exclusive, equitable jurisdiction. This Court explained this distinction in *Russell v. Todd*, 309 U.S. 280 (1940):

> In federal courts of equity the doctrine of laches was early supplemented by the rule that when the question is of lapse of time barring relief in equity, such courts, even though not regarding themselves as bound by state statutes of limitations, will nevertheless, ***when consonant with equitable principles***, adopt and apply as their own, the local statute of limitations applicable to the equitable causes of action in the judicial district in which the case is heard.
>
> Even though there is no state statute applicable to similar equitable demands, when ***the jurisdiction*** of the federal court ***is concurrent*** with that at law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations. It thus stays its hand

in aid of a legal right which, under the Rules of Decision Act, would be unenforcible [sic] in the federal courts of law as well as in the state courts.

But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and in the absence of any state statute barring the equitable remedy in like cases, the federal court is remitted to and applies the doctrine of laches as controlling.

Id. at 288-89 (emphasis added, citations omitted). *See also Cope*, 331 U.S. at 463-64 (finding that even though the case arose in equity, the statute of limitations barred the claim because "the scope of the relief sought and the multitude of parties sued [gave] ***equity concurrent jurisdiction*** to enforce the legal obligation [there] asserted")(emphasis added); *Hughes v. Reed*, 46 F.2d 435, 438 (10th Cir. 1931)("Where the jurisdiction of law and equity are concurrent, the applicable statute of limitations of the state governs, and not the equitable doctrine of laches. There is some confusion in the authorities upon the point, ***growing out of a failure to distinguish a purely equitable action*** against corporate officers, as to enforce a trust, and a legal action seeking money damages for a breach of statutory or common-law duty, brought in equity for convenience. ***It is only in the latter case that concurrent jurisdiction exists***." [emphasis added]).

As explained in Pomeroy's at § 139, "concurrent" equity jurisdiction "embraces all those civil cases in which the primary right, estate, or interest of the complaining party sought to be maintained, enforced, or redressed is one which is *cognizable by the law*, and in which the remedy conferred is of the same kind as

that administered, under the like circumstances, *by the courts of law*– being ordinarily a recovery of money in some form." ***The existence of concurrent equitable jurisdiction*** is founded on the inadequacy of a concurrent legal remedy, *i.e.*, a remedy "of the same general nature" as an equitable remedy, which may be applied to supplement a legal remedy and provide complete relief. *Id.* at §§ 173, 175, 139. "The very definition of . . . [concurrent equitable] jurisdiction assumes that the remedies administered under a given state of circumstances, by equity and by the law, are ***substantially the same***, – recoveries of money, or of specific tracts of land, or of specific chattels." *Id.* at § 173 (emphasis added).[12]

On the other hand, "exclusive" equity jurisdiction was exercised when the remedy was one equity courts alone could confer, even where legal remedies were also available for the same violation. *Id.* at § 138.

> Cases in which the remedy sought and obtained is one which equity courts alone are able to confer must, upon any consistent system of classification, belong to the exclusive jurisdiction of equity, even though the primary right, estate, or interest of the party is one which courts of law recognize, and for the violation of which they give some remedy. Thus a suit to compel the specific performance of a contract falls under the exclusive jurisdiction of equity, although a legal right also arises from the contract, and courts of law will give the remedy of damages for its violation.

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[12] *See* Pomeroy's at §§ 185-188 (examples of actions falling within concurrent jurisdiction, including contribution, exoneration and accounting).

Id.

Injunctive relief, including injunctive relief addressing nuisances, *id.* at ¶ 221a, was always considered part of an equity court's "exclusive jurisdiction" and not "concurrent jurisdiction." *Id.* at §§ 136 ("remedies granted . . . of a kind which are peculiar to equity courts [include] . . . injunction"), 110, 170, 172, 221, 221a; *see also Federal Election Commission v. Christian Coalition*, 965 F. Supp. 66, 71 (D.D.C. 1997)("injunctive relief is based solely on equity's 'exclusive jurisdiction'"); *Gruca v. U.S. Steel Corp.*, 495 F.2d 1252, 1258 (3d Cir. 1974)(jurisdiction is "exclusive" and not "concurrent" when the remedy sought cannot be achieved at law).

The critical mechanism for distinguishing between exclusive and concurrent equity jurisdiction has never been an examination of the substantive right forming the basis of the action because exclusive equitable jurisdiction may exist where an underlying right is purely legal, such as a case premised on a statutory right (like the case here).

> The remedies particular to equity are not confined to cases in which the primary right of the complaining party, whatever be its kind, is equitable; they are given in numerous classes of instances where such a right ... is wholly legal. Thus a legal estate in land may be protected by the exclusively equitable remedy of injunction against nuisances . . . . Again, the particular fact or event which gives rise to the right to such a remedy, may also be the occasion of a legal remedy and a legal remedial right simultaneous with the equitable one. This is especially true with reference to fraud, mistake, and accident.

> Fraud may at the same time be the occasion of the legal remedy of damages and of the equitable relief of cancellation. These two cases cannot, however, be regarded or treated as belonging to the concurrent jurisdiction; such a mode of classification could only be productive of confusion.

Pomeroy's at § 138. Thus, to distinguish between exclusive and concurrent equitable jurisdiction, one assesses whether the remedy involved "is given by courts of equity alone," in which case the action falls under exclusive jurisdiction, not concurrent jurisdiction. *Id.*

Had the court of appeals properly applied the decisions of this Court, it would have concluded that the concurrent remedy doctrine has no application. The doctrine only operates when there are two remedies, one at law and one within concurrent equity jurisdiction, which are "of the same general nature" in terms of the relief to be provided. *See, e.g.*, Pomeroy's at § 175. Not only does the injunctive relief remedy not fall within concurrent equity jurisdiction, but also it is a remedy wholly different in nature.

Given that petitioners' claims for injunctive relief arise in exclusive equitable jurisdiction, neither the concurrent remedy doctrine nor the statute of limitations apply. *See Holmberg*, 331 U.S. at 463-64. Accordingly, petitioners ask this Court to grant review so that TVA's illegal and harmful operation of Colbert 5 without an NSR permit will not continue to go unchecked.

III. THE ELEVENTH CIRCUIT'S RULING DISMISSING PETITIONERS' NSPS CLAIM FOR INADEQUATE NOTICE GROUNDS IS AN UNSUPPORTED RESTRICTION ON CITIZEN SUITS INCONSISTENT WITH CAA REGULATIONS.

In finding petitioners' pre-suit notice inadequate, the Eleventh Circuit imposed restrictions not required by law. As the Eleventh Circuit noted, App. 26a, EPA regulations specify that notice letters must provide "sufficient information to permit the recipient to identify" the specific standard being violated, the violative activity and the responsible persons, the date and location of the alleged violation, and the name and address of the person giving the notice. 42 U.S.C. 54.3(b). The Eleventh Circuit acknowledged that petitioners' notice letters provided all of this information, but because it found the notice requirement must be "strictly construed" to give the alleged violator the opportunity to fix the problem, the court faulted the letter as overbroad. App. 29a.

The Eleventh Circuit erred because although it acknowledged that the notice letter must be reviewed *de novo*, the court never compared the notice letter with the complaint. It is true that the notice letter made the broad assertion that TVA had violated all of Subpart Da's requirements since 1982, App. 29a, but the complaint makes exactly the same assertion. (Doc 80 ¶ 91). More importantly, petitioners had a good faith belief when they issued the notice letter that because TVA denied, and indeed denies to this day, that it is subject to Subpart Da, that TVA was violating all of subpart Da's requirements. Petitioners also

based this good-faith belief on the fact that EPA made the very same allegation when it issued its administrative order to EPA regarding the same modification in 1999. *See In re TVA,* 2000 WL 1358648 (see text preceding fn19], 9 E.A.D. 357, 378 (EPA ALJ Sep 15, 2000), *motion to dismiss denied by, TVA v. United States EPA,* 278 F.3d 1184 (11th Cir. 2002), *opinion withdrawn in part by, TVA v. Whitman,* 336 F.3d 1236 (11th Cir. 2003), *cert. denied,*541 U.S. 1030 (2004).

During the course of discovery, petitioners learned, and acknowledged, that although much of what they had alleged in the notice letter was true, *i.e.*, that TVA had become subject to Subpart Da for all pollutants and had never complied with the emission limits for SO_2 or any of the recordkeeping and reporting requirements, TVA actually had been complying, at times, with Subpart Da's emission limitations for NOx and particulate matter. Nevertheless, because petitioners had a good-faith basis for the allegations in the notice letter, and because the notice letter's allegations matched those in the complaint, petitioners' NSPS claim should not have been dismissed. Accordingly, petitioners seek review to clarify that the adequacy of notice letters must be evaluated based on the pleadings and whether plaintiffs had a good-faith basis for the allegations in the notice letter when the complaint was filed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

NATIONAL PARKS CONSERVATION
ASSOCIATION
AND SIERRA CLUB,
Petitioners,
v.
TENNESSEE VALLEY AUTHORITY,
Respondent.

No. 06-10729.

Entered October 4, 2007.

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Michael James Grode, Jr., Turner Environmental Law Clinic, Atlanta, GA, Michael J. Myers, Albany, NY, Robert D. Tambling, Montgomery, AL, F. William Brownell, Henry V. Nickel, Makram B. Jaber, Hunton & Williams, LLP, Washington, DC, P. Stephen Gidiere, III, Michael D. Freeman, Steven G. McKinney, Balch & Bingham, LLP, Birmingham, AL, for Amici Curiae.
Before EDMONDSON, Chief Judge, and TJOFLAT and GIBSON, United States Circuit Judge for the Eighth Circuit, sitting by designation.

GIBSON, Circuit Judge:

National Parks Conservation Association, Inc., and the Sierra Club appeal from the district court's orders dismissing with prejudice their action against the Tennessee Valley Authority brought under the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(a). National Parks and the Sierra Club claim that TVA violated the Act in connection with work it performed in 1982-83 on a coal-fired boiler at its power plant in Colbert County, Alabama. National Parks and the Sierra Club assert three claims against TVA; the district court denied their motion for partial summary judgment and granted TVA's motion to dismiss two of the claims as barred by the statute of limitations and the remaining claim for failure to provide proper pre-suit notice. We affirm.

I.

The Tennessee Valley Authority is a federal agency that operates over forty electricity generating facilities, including the Colbert Plant in Tuscumbia, Alabama. The Colbert Plant uses five coal-fired boiler units to generate electricity. The process involves burning coal to create steam and passing the steam through a turbine, which drives a generator that produces electricity. National Parks and the Sierra Club claim that the Colbert Plant's operations emit harmful quantities of pollutants, specifically nitrogen oxide, particulate matter, and sulfur dioxide. Although not the subject of this suit, they have similar complaints about TVA's operations at several other power plants located throughout Tennessee, Alabama,

and Kentucky.

The allegations in this lawsuit are limited to only one of the Colbert Plant's boilers, Unit 5. Colbert Unit 5 has been in operation since 1965. In a project that began in 1982 and was completed in 1983, TVA overhauled Unit 5 to restore its lost capacity, extend its life, and reduce or eliminate forced outages. The project cost over $50 million and took three years from planning to implementation. At all relevant times, TVA has operated Unit 5 under an operating permit issued by the Alabama Department of Environmental Management pursuant to its EPA-approved State Implementation Plan; the permit prescribes emission limitations, and the Department monitors and tests the Unit's emissions to ensure compliance. TVA did not obtain construction permits before undertaking the project, however, and National Parks and the Sierra Club claim that this omission, among others, violates the Clean Air Act.

The goal of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). To achieve this goal, the Act employs a program of "cooperative federalism" under which the EPA develops "National Ambient Air Quality Standards" for various pollutants. *Sierra Club v. United States EPA,* 315 F.3d 1295, 1300, 1296 (11th Cir.2002). Each state then formulates a "State Implementation Plan," which limits emissions for specific sources of pollution and which must be

approved by the EPA, to attain and maintain those standards. *Id.; see also*42 U.S.C. §§ 7409, 7410. The Act differentiates between "existing sources" of pollution and "new sources," and these two types of sources are regulated differently. *New York v. United States EPA,* 413 F.3d 3, 13 (D.C.Cir.2005). Thus, TVA's obligations with respect to the project and its subsequent operation of Unit 5 depend on how Unit 5 is classified under the Act.

"New sources" of pollution include both newly built units and plants as well as existing ones that have been "modified" in a way that increases their emissions, according to the definitions set forth in the Act and EPA regulations. *See, e.g.,*42 U.S.C. § 7411(a)(2), (4). Unlike existing sources, new sources and modified sources are subject to the New Source Performance Standards, 42 U.S.C. § 7411, 40 C.F.R. Part 60, which impose stringent emission limitations and other requirements such as monitoring and testing. New sources and modified sources also are subject to New Source Review,[1] which requires the

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[1] New Source Review encompasses two regulatory programs. The "Prevention of Significant Deterioration" program governs sources located in areas that are in attainment of the EPA's air quality standards for the pollutant in question or where there is insufficient information to evaluate whether the standards have been met. *See New York v. EPA,* 413 F.3d at 12; 42 U.S.C. §§ 7470-7492. The "Nonattainment New Source Review" program governs sources located in areas that have not attained the air quality standards for the pollutant in question. *See New York v. EPA,* 413 F.3d at 12; 42 U.S.C. §§ 7501-7515. Count I of National Parks' and the Sierra Club's complaint alleges that Unit 5's emissions of nitrogen oxide and particulate matter subject TVA to

proponent of a proposed construction or modification to complete various requirements before the project can proceed, such as obtain construction permits and determine emission controls to be installed in the source. *See*42 U.S.C. § 7475(a); *Tenn. Valley Auth. v. Whitman,* 336 F.3d 1236, 1244 nn.12-13 (11th Cir.2003). The New Source Performance Standards and New Source Review programs are implemented through EPA-approved State Implementation Plans. *See New York v. EPA,* 413 F.3d at 11-14.

"Existing sources," in contrast, are plants, units, and other sources that were built before the EPA proposed otherwise applicable standards. 42 U.S.C. § 7411(a)(6), (2). While they are subject to several sets of regulations including State Implementation Plans, they have "grandfathered" status and are not subject to New Source Review or the New Source Performance Standards. *New York v. EPA,* 413 F.3d at 13. This system is intended to achieve environmental controls without unduly hampering economic growth. *Id.*

In 1999, the EPA charged TVA with modifying several of its units in violation of the New Source Review programs; Colbert Unit 5 was among these units. The EPA found TVA guilty in administrative proceedings and ordered it to come into compliance

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the Prevention of Significant Deterioration program requirements. Count II alleges that its emissions of sulfur dioxide subject TVA to the Nonattainment New Source Review program requirements. The distinction between these two programs does not affect our analysis, so we refer to the counts collectively as the "New Source Review" claims.

with the Act, but this Court refused to enforce the order after concluding that the administrative proceedings were unconstitutional. *Whitman,* 336 F.3d at 1260. The EPA has not pursued prosecution of TVA for these alleged violations.

After the EPA's action failed, National Parks and the Sierra Club sent TVA notice of their intent to sue for Clean Air Act violations at the Colbert Plant and nine other power plants located throughout Tennessee, Alabama, and Kentucky. Various suits were filed against TVA under the Act's citizen suit provision, 42 U.S.C. § 7604(a). Two of these were filed in the district court below, the present suit and a separate a suit filed by the Sierra Club and the Alabama Environmental Council. That separate suit alleged that TVA's operations at the Colbert Plant repeatedly violated the 20% opacity limitation, an emission limitation for particulate air pollution established by Alabama's State Implementation Plan, during the five-year period from 1997 to 2002. *Sierra Club v. Tenn. Valley Auth.,* 430 F.3d 1337, 1339-41 (11th Cir.2005). The district court granted summary judgment to TVA, holding that there could be no violations because, although the Plant's emissions exceeded the 20% opacity limitation, they were "within the forgiveness zone" of the Alabama Department of Environmental Management's 2% de minimis rule. *Id.* at 1339. This Court reversed in part, reasoning that the 2% de minimis rule had not been approved by the EPA and thus was not part of Alabama's State Implementation Plan. *Id.* at 1346-47. We affirmed the dismissal of the plaintiffs' claim for civil penalties as

barred by TVA's sovereign immunity but remanded for reconsideration of whether the plaintiffs were entitled to injunctive and declaratory relief for claims arising from the Plant's violations of the opacity limitation. *Id.* at 1357.

Meanwhile, the instant suit was pending in the district court. National Parks and the Sierra Club allege three counts, all relating to the 1982-83 project and subsequent operation of Colbert Unit 5. The first two counts allege that TVA modified Unit 5 in violation of the New Source Review programs by failing to obtain construction permits, failing to perform air quality analysis and install emission controls, failing to obtain offsets, and operating the Unit as illegally modified. The third count alleges that the Unit's pollutant emissions after the modification exceeded EPA limitations and failed to comply with other requirements of the New Source Performance Standards. National Parks and the Sierra Club seek civil penalties and declaratory and injunctive relief on all counts. They do not dispute that Colbert Unit 5 at all relevant times had an operating permit issued by the Alabama Department of Environmental Management, which monitored compliance as required by Alabama's State Implementation Plan for existing sources. To be viable, all three counts require the 1982-83 project to be characterized as a "major modification," triggering the EPA's New Source Review preconstruction permitting requirements and the emission limitations established by the New Source Performance Standards described above. TVA contends that the 1982-83 project was not a major

modification and, in any event, would fall under the exception for routine maintenance, repair, and replacement.

Without deciding this issue, the district court made a series of rulings against National Parks and the Sierra Club, each of which they now challenge on appeal. First, the district court denied National Parks' and the Sierra Club's motion for partial summary judgment on the issue of whether the 1982-83 project involving Colbert Unit 5 was a "modification," reasoning that the parties dispute several factual issues including how to measure the changes in emissions and whether the work was routine maintenance and repair according to industry standards. Next, the district court granted in part TVA's motion for partial summary judgment on the two New Source Review counts. The court held that the claims for civil penalties were barred on statute of limitations grounds, 28 U.S.C. § 2462, where the suit was filed in 2001, well over five years after the work on Unit 5 took place; the alleged violations of preconstruction requirements were not continuing violations; and the concurrent remedy doctrine barred the claims for injunctive and declaratory relief. In a third order, the district court granted TVA's motion to dismiss National Parks' and the Sierra Club's New Source Performance Standards claim for failure to comply with the pre-suit notice requirements of 42 U.S.C. § 7604(b). The court held that the plaintiffs' notice letter lacked specificity where it broadly alleged nearly 20 years' worth of daily violations of nearly all of the potentially applicable regulations, when in fact

the New Source Performance Standards violations ultimately alleged in the complaint were confined to one pollutant.

After these rulings, the action remained in the district court awaiting consolidation with *Sierra Club v. Tennessee Valley Authority,* which was on appeal from the district court to this Court. After this Court handed down its decision in *Sierra Club,* however, the parties agreed that no issues were left for the district court to resolve in this case. Accordingly, the court dismissed the entire action. The court observed that, even if the plaintiffs could not obtain relief based on the 1982-83 project on Colbert Unit 5 in this suit, *Sierra Club* established that the Colbert Plant's operations violate the Clean Air Act because of the opacity limitation, and, while TVA is immune to civil penalties, declaratory and injunctive relief might be available for any viable claims. This appeal followed.

II.

We review de novo the district court's orders granting TVA's motions to dismiss and for summary judgment, upholding them if there are no genuine issues of material fact and if TVA is entitled to judgment as a matter of law. *Sierra Club,* 430 F.3d at 1345-46; *see also* Fed.R.Civ.P. 56(c). We view the evidence in the light most favorable to the nonmoving parties, National Parks and the Sierra Club. *Fla. Pub. Interest Research Group Citizen Lobby, Inc. v. EPA,*

386 F.3d 1070, 1082 (11th Cir.2004). Thus, we assume without deciding that the 1982-83 project involving Colbert Unit 5 was a modification that triggered the New Source Review program requirements and the New Source Performance Standards. *See Nat'l Parks Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, 480 F.3d 410, 418 (6th Cir.2007).

First, we address the district court's dismissal of National Parks' and the Sierra Club's two New Source Review claims. They allege that TVA violated various requirements of New Source Review by failing to obtain construction permits, and to install emission controls that would have been specified during the permitting process, before undertaking work on Colbert Unit 5 and by operating Unit 5 after this illegal modification. The district court dismissed these claims on statute of limitations grounds insofar as they sought civil penalties, and it dismissed the claims pursuant to the concurrent remedy doctrine insofar as they sought injunctive and declaratory relief. In the Sierra Club's separate case against TVA, this Court held that TVA has sovereign immunity on any claims for civil penalties, *Sierra Club,* 430 F.3d at 1353-57. In light of that decision, National Parks and the Sierra Club do not contest the dismissal of their claims for civil penalties. They contend nonetheless that the district court improperly dismissed their claims for injunctive and declaratory relief. That dismissal was premised on the concurrent remedy doctrine, which arises only if the legal claims are time-barred. Thus, even though it is established that TVA's sovereign immunity bars National Parks' and the Sierra Club's

legal claims, we begin by considering whether and to what extent the five-year statute of limitations also bars those claims.

A. Statute of Limitations

Legal claims brought under the Clean Air Act are subject to the general federal five-year statute of limitations established by 28 U.S.C. § 2462, wherein the claim is barred if suit is not brought within five years of the date the claim first accrues. A claim first accrues on the date that a violation first occurs. *3M Co. (Minn. Mining & Mfg.) v. Browner,* 17 F.3d 1453, 1462 (D.C.Cir.1994). TVA argues that National Parks' and the Sierra Club's claims accrued in 1982 and 1983, when TVA undertook and completed the work on Colbert Unit 5 without obtaining construction permits, installing certain emission controls, and fulfilling other requirements of New Source Review; thus National Parks' and the Sierra Club's suit filed nearly twenty years later in 2001 is most evidently untimely. The district court agreed, holding that National Parks and the Sierra Club could not advance their New Source Review claims because TVA had done no work on Unit 5 in the five-year period immediately preceding the filing of the complaint. *See also Nat'l Parks,* 480 F.3d at 416 ("Because § 2462 applies, for their suit to be timely, the plaintiffs must identify a wrongful act that took place within five years of their filing this suit.").

National Parks and the Sierra Club advance

several theories why the district court's conclusion was incorrect. First, they argue that their claims were timely filed because TVA's violations of the Act were continuing violations. Under the continuing violations doctrine, the statute of limitations is tolled for a claim that otherwise would be time-barred where the violation giving rise to the claim continues to occur within the limitations period. *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 380-81, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). In determining whether to characterize a violation as "continuing," it is important to distinguish between the "present consequences of a one-time violation," which do not extend the limitations period, and "a continuation of a violation into the present," which does. *Ross v. Buckeye Cellulose Corp.,* 980 F.2d 648, 658 (11th Cir.1993); *see also Ctr. for Biological Diversity v. Hamilton,* 453 F.3d 1331, 1334 (11th Cir.2006).

Numerous district courts have held that violations of requirements of the preconstruction permitting process do not constitute continuing violations of the Clean Air Act. *See, e.g., New York v. Niagara Mohawk Power Corp.,* 263 F.Supp.2d 650, 661 (W.D.N.Y.2003); *United States v. Ill. Power Co.,* 245 F.Supp.2d 951, 957-58 (S.D.Ill.2003); *United States v. Murphy Oil USA, Inc.,* 143 F.Supp.2d 1054, 1083-84 (W.D.Wis.2001); *United States v. Westvaco Corp.,* 144 F.Supp.2d 439, 443-44 (D.Md.2001) (collecting additional cases). The district court joined this line of cases, and they persuade us, as well. The plain language of the Act states, "No major emitting facility ... may be constructed ... unless" the proponent of the

construction or modification fulfills the enumerated requirements. 42 U.S.C. § 7475(a). From this language, it follows that "violations of the preconstruction permitting requirements occur at the time of construction, not on a continuing basis." *Niagara Mohawk,* 263 F.Supp.2d at 661; *see also Ill. Power Co.,* 245 F.Supp.2d at 957 (observing that "the Act provides separate requirements for preconstruction permits and operating permits,"42 U.S.C. §§ 7475 and 7661 *et seq.* respectively, and the plain language of the Act shows that preconstruction permitting violations occur when construction begins, not for the duration of the source's operation). This conclusion is reinforced by the very citizen suit provision National Parks and the Sierra Club invoke, which permits suit "against any person who *proposes to construct or constructs* any new or modified major emitting facility without a permit." 42 U.S.C. § 7604(a)(3) (emphasis added). "Operation" of such a facility is not articulated as a basis for a violation of New Source Review under either 42 U.S.C. § 7475(a) or § 7604(a)(3). A source's operation is regulated separately from its construction under the Act, *compare*42 U.S.C. § 7475 (setting forth requirements to be met prior to construction), *with*42 U.S.C. § 7661 *et seq.* (governing operating permits) *and*42 U.S.C. § 7411(e) ("[p]rohibited acts" under New Source Performance Standards include "to operate such [new] source in violation of any standard of performance applicable to such source"). The relevant Alabama regulations also treated construction and operating permits separately. Under such an arrangement, the statutory provisions governing preconstruction requirements "cannot reasonably be construed to mean

that building or altering a machine without a permit is a violation that continues as long as the machine exists or is operated .... [A] violation of the Clean Air Act's preconstruction permit requirements ... occurs at the time of the construction or modification and is not continuing in nature." *Ill. Power Co.*, 245 F.Supp.2d at 957.

National Parks and the Sierra Club contend that an alternative line of cases has characterized violations of preconstruction requirements as continuing violations, citing *United States v. Duke Energy Corp.*, 278 F.Supp.2d 619, 651 (M.D.N.C.2003), *aff'd on other grounds*,411 F.3d 539 (4th Cir.2005), *vacated by Envtl. Def. v. Duke Energy Corp.*, --- U.S. ----, 127 S.Ct. 1423, 167 L.Ed.2d 295 (2007); *United States v. Marine Shale Processors*, 81 F.3d 1329 (5th Cir.1996); *United States v. Am. Elec. Power Serv. Corp.*, 137 F.Supp.2d 1060 (S.D.Ohio 2001). Of these cases, only the district court opinion in *Duke Energy* offers a rationale for treating violations of preconstruction requirements as continuing violations. However, the case is not directly analogous because the state regulations at issue in *Duke Energy* integrated construction and operating permits, *see*278 F.Supp.2d at 652, such that compliance with preconstruction permitting requirements was a condition for the legal operation of the source. That is not the situation before us, as Alabama's State Implementation Program utilized separate construction and operating permit systems in 1982-83 during the work on Colbert Unit 5, and there is no evidence that TVA's operating permit was otherwise

conditioned on its compliance with New Source Review preconstruction requirements. *See Murphy Oil,* 143 F.Supp.2d at 1083 (finding no continuing violation where "nothing in the statute creates a continuing liability for a facility's failure to obtain a pre-construction permit").

Next, National Parks and the Sierra Club argue that the district court misconstrued the nature of their claims with respect to TVA's operation of Unit 5 after the allegedly illegal modification. They emphasize that TVA never installed and continues to operate without "Best Available Control Technology," emission limitations for modified sources located in areas that are in attainment of the EPA's air quality standards. Alabama regulations required the Director of the Department of Environmental Management to determine the achievable emission limitations for a specific source before granting it a construction permit, Ala. Air Pollution Control Comm'n Reg. 16.4.2(*I*) (1981). This source-specific Best Available Control Technology then would be specified for installation in the modified source. Because TVA never went through the preconstruction permitting process before undertaking work on Unit 5, emission limitations never were specified for the Unit. According to National Parks and the Sierra Club, TVA nonetheless has an ongoing obligation to apply Best Available Control Technology and commits a fresh violation of the Act every time it operates Unit 5 without these emission controls. In support of this position, they cite a portion of the governing Alabama State Implementation Plan stating that modified sources

"shall apply" Best Available Control Technology, Ala. Air Pollution Control Comm'n Reg. 16.4.9(c) (1981).

National Parks and the Sierra Club also point us to a recent decision from the Sixth Circuit where they joined with another organization and litigated the timeliness of Clean Air Act claims arising from TVA's failure to undergo the preconstruction permitting process and its subsequent operations at a Tennessee plant, *National Parks Conservation Association, Inc. v. Tennessee Valley Authority,* 480 F.3d 410, 417 (6th Cir.2007). In that case, the district court had held that the plaintiffs' claims were time-barred. *Id.* at 411. A divided panel of the Sixth Circuit reversed, holding that Tennessee regulations created an ongoing obligation to install Best Available Control Technology, and thus the plaintiffs' claims were timely to the extent that they alleged that TVA failed to apply the emission controls within the limitations period. *Id.* at 418-19. Relying on this decision, National Parks and the Sierra Club argue that, regardless of whether the continuing violations doctrine applies, their first New Source Review claim must survive to the extent that TVA committed a new, discrete violation every time it operated Unit 5 without Best Available Control Technology during the limitations period.

Were this case governed by Tennessee's environmental regulations, the Sixth Circuit's decision in *National Parks* indeed would be persuasive authority for National Parks' and the Sierra Club's position. They advance the same claim in both

cases-TVA modified a source without applying Best Available Control Technology and has been in violation of the Act ever since, committing a discrete violation every time it operates the source without these emission controls. We cannot avoid the fact, however, that the obligation to apply Best Available Control Technology-like all the violations alleged in the New Source Review counts of the complaint in this suit-was solely a prerequisite for approval of the modification, not a condition of Unit 5's lawful operation, under the relevant Alabama State Implementation Plan. Thus, National Parks' and the Sierra Club's claim is completely time-barred.

The complaint charges TVA with violating the Alabama regulations in effect at the time of TVA's work on Unit 5, and these regulations govern our inquiry. A careful review of Alabama's preconstruction permitting program reveals that Best Available Control Technology was to be determined and installed at the time of construction. Alabama maintained completely distinct construction and operating permit programs, and the obligation to apply Best Available Control Technology was confined to the regulations for "Permits to Construct in Clean Air Areas." While these regulations did provide that a major modification "shall apply" Best Available Control Technology, that requirement applied to "each *proposed* emissions unit," Ala. Air Pollution Control Comm'n Reg. 16.4.9(c) (1981) (emphasis added). Moreover, the regulations defined Best Available Control Technology as a set of source-specific emission limitations determined by the Director before construction begins. Ala. Air Pollution

Control Comm'n Reg. 16.4.2(*l*) (1981). The Alabama regulations apparently did not provide a way for a party who had undertaken a modification to obtain such a determination outside the preconstruction permitting process. These provisions compel our conclusion that TVA's obligation to install Best Available Control Technology was to be met at construction time in 1982, and was not an ongoing duty.

While the Alabama regulations cited above and certain portions of the Tennessee regulations interpreted by the Sixth Circuit in *National Parks* share very similar language,[2] we conclude that an

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[2] Like Ala. Air Pollution Control Comm'n Reg. 16.4.9(c), stating that a "major modification shall apply [Best Available Control Technology]" and that this "requirement applies to each proposed emissions unit,"Tenn. Comp. R. & Regs. § 1200-3-9-.01(4)(j)(3) states: "A major modification shall apply best available control technology for any pollutant for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit." Alabama's Best Available Control Technology requirement was classified within regulations governing "Permits to Construct in Clean Air Areas"; Tennessee's regulations at § 1200-3-9-.01 are entitled "Construction Permits." In addition, Tenn. Comp. R. & Regs. § 1200-3-9-.01(4)(a)(1) provides, "No major stationary source or major modification ...*shall begin actual construction* unless the requirements of this paragraph, as applicable, have been met" (emphasis added). To the extent the Sixth Circuit interpreted the "shall apply" language by itself as creating an ongoing obligation to apply Best Available Control Technology every time the source operates, *see Nat'l Parks,* 480 F.3d at 418-19, even though

important difference in the states' plans ultimately precludes us from reaching the same result as our sister circuit. Tennessee's State Implementation Plan provided that, if a party failed to obtain a construction permit specifying emission limitations at the time of construction or modification, a construction permit could be issued at a later date "to assure that these regulatory requirements are met." Tenn. Comp. R. & Regs. § 1200-3-9-.01(1)(e). The Sixth Circuit construed this provision as creating an ongoing obligation to comply with requirements of the preconstruction permitting process. *National Parks,* 480 F.3d at 413. National Parks and the Sierra Club have not pointed out any analogous provision in the Alabama Plan in effect in 1982, and we are not aware of one. Unlike Tennessee, Alabama limited the obligation to apply Best Available Control Technology to proposed modifications, with no caveat continuing the obligation for the operating life of the source if it was not met during the construction phase. In light of this distinction, we cannot say that TVA's failure to apply Best Available Control Technology on Unit 5 constitutes a "series of discrete violations" of the relevant Alabama regulations, *Nat'l Parks,* 480 F.3d at

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Tennessee maintained separate construction and operating permit systems and the cited provision is embedded within a set of regulations explicitly governing "Construction Permits," *see id.* at 420 (Batchelder, J., dissenting), we do not adopt that interpretation of the similarly worded Alabama regulations. Without a provision imposing an ongoing duty to meet preconstruction requirements that were not met at the time of construction, there is no basis for us to conclude that National Parks' and the Sierra Club's New Source Review allegations in this case are timely under the governing Alabama regulations.

417, some of which fall within the limitations period. *See Niagara Mohawk,* 263 F.Supp.2d at 665 (courts have held that a violation of the obligation to install Best Available Control Technology before construction does not "create continuing obligations or constitute continuing violations for purposes of the application of the statute of limitations").

We likewise reject National Parks' and the Sierra Club's argument that, although TVA had an operating permit issued by the Alabama Department of Environmental Management, it continually violated the Act by failing to obtain an "Air Permit" specifying Best Available Control Technology for Unit 5 after Alabama's State Implementation Plan was amended in 1985. The 1985 amendments revised Alabama's permitting system so that construction and operating permits were combined and issued as Air Permits. They provided that a person modifying a source had to obtain an Air Permit before construction and, if that person failed to do so, the source could not operate legally until an Air Permit was obtained. Ala. Admin. Code Rule 335-3-14-.01(1)(a), (c). As a threshold matter, it is not clear that National Parks and the Sierra Club have properly charged any violations of the 1985 Alabama regulations; the complaint charges TVA only with violating the Alabama preconstruction permitting regulations in effect during TVA's work on Unit 5 in 1982-83. Moreover, the 1985 amendments have no significance in this case where it is undisputed that TVA had an operating permit for Unit 5 at the relevant times. There is no indication that the 1985 amendments were to apply retroactively, reviving

TVA's obligation to obtain a preconstruction permit specifying emission limitations. Rather, all construction and operating permits, the latter of which TVA had, were converted to Air Permits by operation of law in 1985. National Parks' and the Sierra Club's position amounts to an argument that TVA has been violating the Act continually by operating Unit 5 under the wrong permit, and we reject it. *See United States v. AM Gen. Corp.,* 34 F.3d 472, 475 (7th Cir.1994) (rejecting collateral attack on permit).

Where TVA has not been accused of violating its operating permit, Unit 5's present pollutant emissions have significance in this case only as a current ill effect of its past failure to fulfill the requirements of Alabama's preconstruction permitting program in 1982. That is not sufficient to bring National Parks' and the Sierra Club's New Source Review claims within the five-year statute of limitations, which serves several important purposes including barring stale claims and protecting expectations that have settled over time. *See 3M Co.,* 17 F.3d at 1457. Under these circumstances, a plaintiff's recourse is to allege violations of the operating permit. *See Niagara Mohawk,* 263 F.Supp.2d at 662; *see also Murphy Oil,* 143 F.Supp.2d at 1081-82. As the district court observed, the Sierra Club apparently has done this successfully in its separate suit against TVA charging opacity limit violations at the Colbert Plant. To be sure, relief is available under the Act if those operations exceed the 20% opacity limitation, *Sierra Club,* 430 F.3d at 1350-but not for the preconstruction violations alleged in this separate suit, which are

time-barred.

B. Concurrent Remedy Doctrine

By its plain language, the statute of limitations set forth in 28 U.S.C. § 2462 applies only to claims for legal relief; it does not apply to equitable remedies. *United States v. Banks,* 115 F.3d 916, 919 (11th Cir.1997). Nonetheless, where a party's legal remedies are time-barred, that party's concurrent equitable claims generally are barred under the concurrent remedy doctrine. *Cope v. Anderson,* 331 U.S. 461, 464, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947); *see also Gilbert v. City of Cambridge,* 932 F.2d 51, 57 (1st Cir.1991) (stating that "it is settled ... that where legal and equitable claims coexist, equitable remedies will be withheld if an applicable statute of limitations bars the concurrent legal remedy"); *United Transp. Union v. Fla. E. Coast Ry. Co.,* 586 F.2d 520, 523-24 (5th Cir.1978) (holding that, where both legal and equitable relief are sought, the statute of limitations bars both).

National Parks and the Sierra Club rely on *Banks* and *United States v. Cinergy Corp.,* 397 F.Supp.2d 1025, 1032 (S.D.Ind.2005), in arguing that the concurrent remedy doctrine does not bar their claims. *Banks* carved out an exception to the concurrent remedy doctrine so that statutes of limitations cannot operate to bar "claims brought by the federal government in its sovereign capacity" as enforcer of environmental regulations. 115 F.3d at 919

(government sought injunction against party discharging dredged or fill materials on wetlands in violation of Clean Water Act). National Parks and the Sierra Club argue that this exception should be extended to them because they are acting as "private attorneys general" to enforce environmental regulations for the public benefit, *see Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 16-17, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981). There is no authority, however, for expanding the governmental exception to preclude application of the concurrent remedy doctrine in the instant suit, which was filed by private parties where the government has declined to act. The statute provides that plaintiffs in a citizen suit are acting "on [their] own behalf," 42 U.S.C. § 7604(a); though they may be acting as private attorneys general, they do not represent the public at large in the same way the government does when it brings suit to enforce the statute. *See Conservation Law Found. of New England, Inc. v. Browner,* 840 F.Supp. 171, 175 (D.Mass.1993) (citing legislative history of citizen suit provision).

Alternatively, National Parks and the Sierra Club argue that the doctrine is inapplicable because their legal and equitable claims do not seek "concurrent" remedies, urging us to adopt the reasoning articulated by the Indiana district court in *Cinergy.* In *Cinergy,* the court held that the concurrent remedy doctrine did not bar a citizen suit seeking injunctive relief that was paired with a time-barred claim for civil penalties. The court held that the

separate claims were not concurrent because the remedies had "different goals and effects." 397 F.Supp.2d at 1032 (identifying the goal of civil penalties as deterrence because fine is paid to the government, while the goal of equitable relief is "to stop threats to the environment"). We are not aware of other authority for this novel distinction and are not persuaded that it is a meaningful one. We conclude that the civil penalties and equitable relief sought in this case are concurrent because "an action at law or equity could be brought on the same facts." *United States v. Telluride Co.,* 146 F.3d 1241, 1248 n. 12 (10th Cir.1998) (internal quotations and citations omitted).

Finally, National Parks and the Sierra Club argue that, after *Sierra Club* established TVA's sovereign immunity on claims for civil penalties, their only claim is for equitable relief, and thus their claims for declaratory and injunctive relief must survive because they no longer have any concurrent legal claim, time-barred or otherwise, to support application of the concurrent remedy doctrine. We reject this argument. That TVA has sovereign immunity by no means renders its statute of limitations defense superfluous. TVA was entitled to raise multiple defenses, and "the plaintiffs' request for civil penalties remains part of the operative complaint." *Nat'l Parks,* 480 F.3d at 416. Thus, we have considered whether and to what extent the five-year statute of limitations and the concurrent remedy doctrine bar the legal and equitable New Source Review claims National Parks and the Sierra Club assert in this suit, and we conclude that the district court correctly dismissed

those claims. Consequently, we need not address TVA's laches defense.

III.

In their third claim, National Parks and the Sierra Club allege that TVA's operation of Colbert Unit 5 violated the New Source Performance Standards, *see* 42 U.S.C. § 7411, on a daily basis for nearly twenty years. The district court dismissed the claim, holding that National Parks and the Sierra Club had failed to comply with the pre-suit notice requirement for citizen suits established by 42 U.S.C. § 7604(b). National Parks sent TVA notice of its intent to sue on October 30, 2000,[3] but the district court found the letter to be "the notice equivalent of a 'shotgun' complaint" because it broadly alleged daily violations of an entire set of regulations without specifically identifying the individual alleged violations and dates.

We review the sufficiency of pre-suit notice de novo. *See Waterkeepers N. Cal. v. AG Indus. Mfg., Inc.,* 375 F.3d 913, 917 (9th Cir.2004). In general, unless the plaintiff provides specific notice of intent to sue at least 60 days before filing the complaint, a citizen suit may not be maintained. *See Hallstrom v. Tillamook County,* 493 U.S. 20, 31, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989); *Nat'l Envtl. Found. v. ABC Rail*

[3] The Sierra Club sent a separate letter shortly thereafter notifying TVA that it intended to join National Parks' suit.

Corp., 926 F.2d 1096, 1097 (11th Cir.1991) (notice requirement "is a mandatory condition precedent to the filing of a citizen suit" under Clean Water Act). Under the Clean Air Act's citizen suit provision, at least 60 days before commencing the suit, the citizen plaintiff must give "notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order" allegedly violated. 42 U.S.C. § 7604(b)(1)(A). The notice must contain sufficient information to permit the recipient to identify the specific standard, limitation, or order which has allegedly been violated, the activity alleged to be in violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name and address of the person giving the notice.

40 C.F.R. § 54.3(b) (2004). National Parks' notice letter alleged violations at ten of TVA's coal-fired power plants in Tennessee, Alabama, and Kentucky. The pertinent portion of the letter for Count III of the complaint alleged that TVAviolated regulations known as New Source Performance Standards ("NSPS") at Colbert Unit 5. Pursuant to Section 111 of the Clean Air Act, 42 U.S.C. § 7411, EPA has promulgated standards of performance for a variety of major air pollution source categories, including electric utility steam generating units. These standards apply to the owner or operator of any electric utility steam generating unit, "the construction or modification of which is commenced after the date of publication ... of any standard ... applicable to that

facility." 40 C.F.R. § 60.1(a) and §§ 60.40a-49a (Subpart Da). The changes [TVA] made to Colbert Unit 5 in 1983 that are discussed above caused an increase in the maximum hourly emissions rate achievable by the unit and therefore constituted a "modification" as that term is defined at 40 C.F.R. §§ 60.2 and 60.14(a). Accordingly, beginning in 1983, [TVA was] required to meet all of the requirements of Subpart Da, and [TVA has] failed every day thereafter to do so.

National Parks and the Sierra Club first argue that they were not obligated to provide notice. They point out that some citizen suits under the Act are not subject to the notice requirement, *see*42 U.S.C. § 7604(a)(3) & (b), and argue that, when a claim that requires notice is related to one that does not, both claims can proceed without notice. National Parks and the Sierra Club admit that, standing alone, the New Source Performance Standards claim would require pre-suit notice, but they argue that, because the claim has been brought with the New Source Review claims, which would not require notice if brought under 42 U.S.C. § 7604(a)(3), notice was not required. After reviewing the precedent National Parks and the Sierra Club cite in support of this proposition, we reject their argument. In some cases brought under the Resource Conservation and Recovery Act and the Clean Water Act, courts have excused pre-suit notice requirements where citizens bring a "hybrid" complaint that alleges some claims that may be brought immediately and some that are subject to a waiting period after notice of intent to sue is given. *See, e.g., Dague v. City of Burlington,* 935 F.2d 1343, 1351-52 (2d Cir.1991), *rev'd*

*on other grounds,*505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992); *Covington v. Jefferson County,* 358 F.3d 626, 637 (9th Cir.2004). However, the plaintiffs in these cases gave notice but did not observe the applicable waiting period; it was the excusal of this post-notice delay requirement that was squarely before the courts. *Dague,* 935 F.2d at 1350; *Covington,* 358 F.3d at 636-37. In this case, the specificity of the notice given is at issue. Thus, the "hybrid complaint" cases cited by National Parks and the Sierra Club do not give us a basis for eliminating the requirement that specific notice be given for their New Source Performance Standards claim.

Next, National Parks and the Sierra Club argue that their letter complied with the notice requirement because it provided "sufficient information to permit the recipient to identify" the nature of their New Source Performance Standards claim, as required by 40 C.F.R. § 54.3(b). They observe that the letter identified Colbert Unit 5 as the location of the violations, dated the violations as beginning from 1983, and identified Subpart Da (40 C.F.R. §§ 60.40a-49a) out of the 80 subparts of 40 C.F.R. Part 60 as the governing regulations. They remind us that the notice requirement does not demand that a citizen plaintiff "list every specific aspect or detail of every alleged violation." *Pub. Interest Research Group of New Jersey, Inc. v. Hercules, Inc.,* 50 F.3d 1239, 1248 (3d Cir.1995). They also point out that, apart from the letter, TVA should have known exactly what violations were alleged by virtue of the administrative action the EPA had brought against it earlier, where this citizen

suit was filed only as a "backstop" in case the EPA's action failed.

We conclude, as the district court did, that National Parks' notice letter was inadequate because it failed to provide enough information to permit TVA to identify the allegedly violated standards, dates of violation, and relevant activities with the degree of specificity required by the regulations. The notice requirements are strictly construed to give the alleged violator the opportunity to correct the problem before a lawsuit is filed. *See Waterkeepers,* 375 F.3d at 916-17; *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,* 484 U.S. 49, 60, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). Rather than identifying the "specific standard" allegedly violated, National Parks' letter broadly alleged that the operation of Colbert Unit 5 violated "all of the requirements of Subpart Da." Subpart Da sets emissions standards for several pollutants including sulfur dioxide, nitrogen oxide, and particulate matter. National Parks and the Sierra Club eventually discovered that TVA was in compliance with the standards for nitrogen oxide and particulate matter, and their ultimate New Source Performance Standards claim alleged only that TVA violated the standards for sulfur dioxide-a much narrower claim than the letter's broad allegations of constant violations of the entirety of Subpart Da. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,* 273 F.3d 481, 487 (2d Cir.2001) ("To provide adequate notice of each violation that will be targeted in the citizen suit, the [intent to sue] letter must differentiate ... one

pollutant from another," under analogous Clean Water Act notice regulations.). Similarly, the allegation that TVA has "failed every day" to comply with EPA regulations since its modification of Unit 5 in 1983 does not identify specific activities that violate the Act, and, while the letter does date these violations to a nearly 20-year span of time, this provides little guidance to TVA in identifying the violations of which it was accused. "Aiming for breadth of coverage, the letter[ ] substitute[s] sweeping language for the particularity required by"40 C.F.R. § 54.3(b). *Karr v. Hefner,* 475 F.3d 1192, 1201 (10th Cir.2007).

The language of the regulation does not suggest that the notice may be good enough if it generally orients the agency or violator as to the type of violation .... [T]he recipient of the notice must understand from the notice what the citizen *is alleging* not what the citizen could allege if the citizen knew more or cared about other possible transgressions. *Cal. Sportfishing Prot. Alliance v. City of W. Sacramento,* 905 F.Supp. 792, 799 (E.D.Cal.1995), *quoted in Karr,* 475 F.3d at 1200-01. National Parks and the Sierra Club cannot rely on TVA's participation in the EPA administrative action involving similar allegations to substitute for the lack of specificity in their letter. *See Save Our Health Org. v. Recomp of Minn., Inc.,* 37 F.3d 1334, 1337-38 (8th Cir.1994) (complaint dismissed because plaintiff failed to include alleged violations in notice, even though plaintiff claimed defendant had independent knowledge of violations). Thus, we affirm the dismissal of the New Source Performance Standards claim for lack of proper pre-suit notice.

IV.

Finally, National Parks and the Sierra Club appeal the district court's order denying their motion for partial summary judgment on the issue of whether the 1982-83 project involving Colbert Unit 5 was a "major modification" triggering the requirements of New Source Review and the New Source Performance Standards. Because we affirm the dismissal of their claims while assuming the project was a major modification, it is not necessary to review this order. In any event, we lack jurisdiction to review this denial of the motion for summary judgment because it is not an appealable final judgment under 28 U.S.C. § 1291. *See Valdes v. Crosby,* 450 F.3d 1231, 1235 (11th Cir.2006).

For the above reasons, the dismissal of this action is **AFFIRMED** in its entirety.

UNITED STATES DISTRICT COURT, N.D. ALABAMA, NORTHWESTERN DIVISION.

NATIONAL PARKS CONSERVATION ASSOCIATION, INC. and SIERRA CLUB, Plaintiffs

v.

TENNESSEE VALLEY AUTHORITY Defendant.

No. Civ.A. 01-403-VEH.

Entered Jan. 17, 2006.

MEMORANDUM OPINION

HOPKINS, District Judge:

Plaintiffs National Parks Conservation Association, Inc. ("NPCA") and Sierra Club, Inc. ("Sierra Club")[1] have filed an action under the citizen suit provision of the Clean Air Act ("CAA" "the Act"), 42 U.S.C. § 7604(a) (2000) which, in three (3) separate Causes of Action, asserts Tennessee Valley Authority ("TVA") violated the CAA by its 1982 work at the Colbert Unit 5 plant ("the work"). NPCA says the work constituted a "modification" under the CAA, triggering the New Source Performance Standards ("NSPS"), Non-Attainment New Source Review ("NNSR") and

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[1] The court will continue its practice of referring to the Plaintiffs collectively as "NPCA" unless the context clearly indicates otherwise.

New Source Review ("NSR"),[2] and Prevention of Significant Deterioration ("PSD") standards of the CAA. Second Amended Complaint ("SAC"). (Doc. 80.)

In the latter part of 2005, the court, acting on TVA motions that had been pending for some time, entered orders on motions to dismiss filed by TVA where TVA sought judgment on all three (3) NPCA Causes of Action. *See* Doc. 213 and Doc. 215 (First and Second Causes of Action); Doc. 217 (Third Cause of Action).

On January 3, 2006, (doc. 220), the court ruled on a Motion (doc. 218) filed by NPCA requesting a "brief telephonic status conference," and the Response thereto (doc. 219) filed by the Tennessee Valley Authority ("TVA"). The court granted the motion in part by directing NPCA "to provide to the court and to TVA a proposed agenda of matters to be addressed," and directing TVA to file a response to NPCA's proposed agenda. (Doc. 220) NPCA filed its Proposed Agenda. (Doc. 221). TVA filed its Response (doc. 222), to which NPCA filed a Reply (doc. 223).

The court anticipated NPCA might, as part of

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[2] In 1982 and 1983, the area around Colbert 5 was a "non-attainment" area. The parties agree, and prior orders in this action have stated, that the area around Colbert 5 has been an attainment area since the early 1990's. So, if the relevant time is, or turns out to be, 1982-1983, the NNSR provisions would apply; if the relevant time is the five (5) years preceding the filing of the Complaint, NSR provisions would govern.

the status conference, seek reconsideration of the orders entered on TVA's motions to dismiss described above. And NPCA did so in part. NPCA's discussion of the agenda, however, addressed the Court's announced intention to consolidate this action with the court's other TVA Colbert plant CAA citizen suit action *Sierra Club v. TVA,* 430 F.3d 1337 (11th Cir.2005), *Petition for Rehearing Or Rehearing En Banc* filed January 5, 2005 (*"Sierra Club v. TVA"*). In response to that announcement, NPCA said:

> .... in light of the Court's recent rulings that appear to have effectively dismissed all counts in the NSR case. If this is correct and no claims for injunctive relief in the NSR case alone have survived, then there is no case with which to consolidate the opacity case, and the plaintiffs would ask the court to enter judgment for the defendant forthwith.

Doc. 221 at p. 2.

In its response, TVA concurred with NPCA's assessment:

> TVA agrees with the Plaintiffs that the Court's orders have, as Plaintiffs put it, "effectively dismissed all counts in the NSR case."

Doc. 222 at p. 1.

I have reviewed and considered what NPCA and TVA have said is the effect of the Orders in question (docs. 213, 215, and 217), and, having done so, concluded that their assessment is correct. After setting out the background, followed by discussion of what issues arguably may have remained after those Orders, I conclude that there are no issues left to resolve and that the entry of a final Order dismissing the action is appropriate.

I. *BACKGROUND*

The background of this action, the CAA, the regulatory history, and the court interpretations of the applicable provisions have been set out in previous opinions associated with docs. 213, 215, and 217, and will not be repeated. Suffice it to say that the requirements of the Alabama PSD and NNSR provisions are triggered when a new source is built or when an existing major stationary source constructs a "major modification." *See* AAPCC Regulations 16.4.8 (Ex. 5 at 10) & 16.3.2(c) (Ex. 6 at 16-8). If triggered, these new source requirements require installation of pollution control equipment that represents best available control technology (BACT) (under the PSD program) or lowest achievable emission rate (LAER) (under the NNSR program). NPCA says these requirements were triggered by the 1982-1983 work at Colbert 5.

II. *ARE THERE ISSUES REMAINING AT THIS TIME?*

In asking for the agenda for the proposed status conference, I did not consider the cumulative effect of the recent Orders. (Docs. 213, 215, and 217). I also did not anticipate: 1) that there would still be any doubt concerning what claims remained in the action after the orders entered on the TVA motions to dismiss, and 2) that the parties would, for different reasons, seek entry of judgment in TVA's favor on all claims.

Having considered the effect of the Orders, I cannot quarrel with NPCA's belief that, under the First and Second Causes of action, it has no claims for relief unless "... the modifications occurred within five years of the filing of the complaint." Doc. 223 at p. 2. The court tried, unsuccessfully, in the Order entered December 8, 2005, which amended its ruling on the First and Second Causes of Action, to eliminate any possible confusion. *See* Doc. 215, amending Doc. 213. At page 4 of doc. 215, the court said that NPCA would still have claims when those claims fell within the five (5) year statute of limitations and asserted that TVA operations of Colbert 5 violate the Clean Air Act. (Emphasis supplied).

The court did not intend to say that the operations of Colbert 5 that might violate the Act had to be caused by a "modification" of Colbert 5 occurring within five (5) years of the filing of the Complaint.

There is no dispute that the construction work at Colbert 5 which NPCA says was a modification triggering the NSPS, NNSR/NSR, and PSD provisions of the CAA took place in 1982 and 1983. I could have been more clear and said NPCA couldn't prove a claim under the First and Second Causes of Action because there had been no work at Colbert 5 in the five-year period immediately preceding the filing of the Complaint in 2001. My confusion arose from a reading of the SAC as, *inter alia,* asserting that TVA's operations of Colbert 5 violate the CAA, combined with my reading of *Sierra Club v. TVA, supra,* which supports that assertion. The distinction between the SAC and *Sierra Club v. TVA,* of course, is that the latter does not tie the illegal operations to the 1982 -1983 work at Colbert 5. NPCA is careful to say that it reads the recent Orders as tying the right to proceed under the First and Second Causes of Action, which assert operation of Colbert 5 without appropriate permitting and the installation of BACT and LAER emission limits, to a "modification" under the Act that falls within the (5 year) statute of limitations. (Doc. 222 at p. 2).

In any event, I anticipated that consolidating this action with *Sierra Club v. TVA,* and addressing the issue of remedies, would moot the issue of whether there were surviving claims since *Sierra Club v. TVA* covers substantially the same time period of operations at the same TVA plant.

III. *DISCUSSION*

Perhaps it is a distinction without a difference but, in light of *Sierra Club v. TVA, supra,* the court was willing to at least consider the possibility that NPCA could prove its First and Second Causes of Action as to TVA's operations of Colbert 5 at this time and going back five (5) years preceding the filing of the Complaint. The court said, and reaffirms, that the NPCA Notice letter was a shotgun notice that did not comply with the notice provisions of the CAA citizen suit provisions, thereby dooming the Third Cause of Action. Having said that, *Sierra Club v. TVA, supra,* was handed down after the court's Order dismissing the First and Second Causes of Action, and the court believed, apparently incorrectly, that *Sierra Club v. TVA* may have opened the door for NPCA to try to prove such violations occurring within the five (5) years preceding the filing of the Complaint. The thinking was that once the 11th Circuit had stated unequivocally that the 2% *de minimis* rule violated the CAA because it was not approved by the EPA and made a part of the Alabama SIP, NPCA may have sought to prove, if it could, that TVA's operations of Colbert 5 today, and going back to 1996, also violate the CAA because the 1982-1983 work, which NPCA says was a "modification" under the Act, was not permitted as the Act requires. An amendment to NPCA's Complaint likely would have been necessary, but since *Sierra Club v. TVA* represents, at the least, a significant intervening change in the law, leave to amend would have been freely granted. F.R. Civ. P. 15.

Put another way, NPCA could send TVA, ADEM, and EPA a pre-suit notice letter tomorrow saying Colbert 5 violates the CAA each time its opacity exceeds 20% as measured by its continuous monitor operating system ("COMS")[3] reading, that it has done so on every occasion listed (using the COMS data supplied to ADEM by TVA), and then file suit sixty (60) days later.

Given my reading of *Sierra Club v. TVA,* any or all of these steps appeared to be a meaningless exercise of formality. *Sierra Club v. TVA* appears to clearly say the Colbert plant is in violation of the CAA, the 2% *de minimis* rule does not excuse the violations, the COMS readings are credible evidence of the violations, and TVA is immune to civil penalties. If this is an accurate recitation of its holding, *Sierra Club v. TVA* seems to leave very little for me to try in that action besides the remedies to be imposed under the Act. And I had the same thinking about this action, which is why I announced my intention to consolidate them once the mandate issued in *Sierra Club v. TVA.*

Whether I don't get it (it meaning "the CAA"), or

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[3] "One of the requirements of the Colbert plant's air permits is that TVA install, maintain, and operate a continuous opacity monitoring system ('COMS') in each of the plant's smokestacks. *See*Ala. Admin. Code r. 335-3-12-.02(3). As its name indicates, COMS is a device that monitors continuously the opacity of a plume of smoke." *Sierra Club v. TVA, supra,* 430 F.3d at 1340 -1341.

the earlier Orders were insufficiently clear,[4] is not important. At this point the court has decided that its earlier decision, which was to await issuance of the mandate in *Sierra Club v. TVA,* then consolidate this action with *Sierra Club v. TVA* and address what remedies would be appropriate in light of *Sierra Club v. TVA,* is no longer an efficient manner of proceeding, and may have the unintended consequence of stretching out for years the resolution of the legality of TVA's operations of its Colbert County plant. Further, in light of the parties' statements in the "status conference" filings, docs. 221-223, both NPCA and TVA take the position that the effect of the Orders (docs. 213, 215, and 217) is that there is nothing left to do but enter judgment in favor of TVA and leave the parties to their appellate remedies should they be so inclined.

I think the parties are correct in their assessment of the status of the file at this point, *i.e.,* that nothing further is left for decision. Further, absent the entry of a final Order, I foresee a scenario where, the *Sierra Club v. TVA* mandate having issued, I proceed as I believe I am directed by that opinion, or any modification thereof, with NPCA then appealing my decisions in this action on the First, Second, and Third Causes of Action to the 11th Circuit.

On appeal, if NPCA is right and I am wrong

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[4] Opacity issues apparently are not limited to Colbert 5's smokestacks.

about the First and Second Causes of Action, then there will be an entirely different remedy question to address, *i.e.,* since TVA should have, but didn't, obtain the appropriate CAA permits in 1982-1983, what is to be done about that now? Does TVA have to do over the 1982-1983 work in accordance with the 1980 CAA emission rule, the legality of which was litigated at length in the 1980's and 1990's without a final decision on its validity by the D.C. Circuit Court of Appeals,[5] or some variation of the 1980 rule in effect in 2001 when this action was filed, or the CAA emission rule in effect at the time I take up the remedies issues on remand in *Sierra Club v. TVA?*[6] I pose the question because I believe, as TVA has told the 11th Circuit in its Petition for Rehearing, that *Sierra Club v. TVA* has effectively decided the issue of CAA liability and only remedies remain to be determined. *See* Doc. 222, Exhibit A (TVA

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[5] *See N.Y v. EPA,* 413 F.3d 3 (D.C.Cir.2005), rehearing *en banc* denied, 431 F.3d 801 (D.C.Cir.2005).

[6] Which would likely be the 2002 rule upheld by the D.C. Circuit in *N.Y. v. EPA, supra,* but might not be if the 2002 rule is still in litigation, has not been fully implemented or, to be more precise, not yet been made part of Alabama's State Implementation Plan ("SIP"). The time for seeking *certiorari* in *NY v. EPA* expires ninety (90) days from the December 9, 2005, denial of rehearing *en banc.* Sup.Ct. R. 22.3. On December 29, 2005, EPA published a Supplemental Notice of Reconsideration of the 2002 rule seeking comments limited specifically to the cost benefit analysis contained in the proposed rule and the effect of *NY v. EPA* on that part of the rule. *See*70 FR 77101-01, 2005 WL 3542379 (F.R.). On December 29, 2005, EPA published a Supplemental Notice of Reconsideration of the 2002 rule seeking comments limited specifically to the cost benefit analysis contained in the proposed rule and the effect of *NY v. EPA* on that part of the rule. *See*70 FR 77101-01, 2005 WL 3542379 (F.R.).

Petition for Rehearing or Rehearing *En Banc*) at p. 10; Exhibit D (Brief of *Amici Curiae* Alabama Pulp and Paper Council and Business Council of Alabama) at p. 4. And if that is correct, how will the conflicting remedies be reconciled?

Further, if NPCA is right and I am wrong about the Third Cause of Action, then NPCA will have the right to prove TVA has violated the Act on a daily basis for more than twenty (20) years.

Further, if NPCA is correct about the viability of its First and Second Causes of Action, there will still remain two legal questions I have determined adversely to NPCA's position:

> 1) Was the work at Colbert 5 subject to the "routine maintenance and repair" ("RMRR") exclusion that applies to projects that are routine within the (electricity generating) industry, by which is meant work of a type performed commonly within that industry, although perhaps infrequently at any specific one or more of any utility's (TVA's here) particular plants; and
>
> 2) Whether emissions increases, for purposes of NSR/PSD analysis, are to be calculated only on the basis of "maximum hourly emission rates," not "annual actual emissions." Maximum hourly emissions must increase before PSD permitting is triggered; greater annual hours of operation, which in turn result in more actual emissions,

is irrelevant to the analysis.[7]

Both are pure legal questions.

The first question has not been addressed by any appellate court since *Wisconsin Electric Power Co. ("WEPCO") v. Reilly,* 893 F.2d 901 (7th Cir.1990), a decision I do not believe the 11th Circuit will follow, at least in part because *WEPCO* relied on the EPA Environmental Appeals Board procedure held unconstitutional by the 11th Circuit in *TVA v. Whitman,* 336 F.3d 1236 (11th Cir.2003). The 11th Circuit, also in *TVA v. Whitman,* observed, but did not decide, the "central disagreement" ... is whether "routine' should be defined relative to an industrial category or to a particular unit." 278 F.3d 1184, 1189(n.3) (11th Cir.2002), *withdrawn in part,*336 F.3d 1236 (11th Cir.2003).

The second question was answered adversely (and by that I mean adversely to NPCA's chances of

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[7] This is the holding of *U.S. v. Duke Energy,* 411 F.3d 539 (4th Cir.2005)*rehearing denied*··· F.3d ···· (August 30, 2005), which this court has already indicated it would follow absent appellate guidance on the issue from the 11th Circuit or the Supreme Court. At the time of this writing, a Petition for Writ of *Certiorari* in *Duke Energy* has been filed by the Environmental Defense Fund, *et al.,* but the Court has yet to rule on the Petition. Docket No. 05-848, filed December 28, 2005. Duke Energy's response is due February 6, 2005. If the United States has taken a position on the Petition, I have been unable to find it.

proving TVA's Colbert 5 1982-1983 work violated the CAA) by the Fourth Circuit in *U.S. v. Duke Energy,* 411 F.3d 539 (4th Cir.2005)*rehearing denied,*--- F.3d ---- (August 30, 2005).

The answers to these issues could be dispositive of NPCA's ability to prove its First and Second Cause of Action claims. They are unlikely to come from the D.C. Circuit, because *NY v. EPA* expressly declined to express an opinion "... as to whether Congress intended to require that EPA use identical regulatory definitions of modification across the NSPS and NSR programs. *Cf. United States v. Duke Energy,* No. 04-1763, slip. op. at 11-19." 413 F.3d 3, 20.[8] The 4th Circuit's use of identical definitions of modification across the NSPS and NSR programs was a critical underpinning of its holding in *Duke Energy.*

Those cases still may not end the matter, because the debate over "increased actual emissions" versus "increased rate of emissions" seems determined to rise up from what I thought was its *NY v. EPA* coffin, *but see* Judge Williams's concurrence in the denial of rehearing, *supra,* 431 F.3d 801, 2005 WL 3334349 (D.C.Cir.2005). Absent the Supreme Court's granting *certiorari* in either *NY v. EPA* or *U.S. v. Duke Energy,* if there is to be further guidance on these issues, it appears it will have to come from the 11th Circuit.

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[8] The 1980 Rule was, technically, not before the Court in *NY v. EPA.*

Finally, if NPCA is right and I am wrong about the Third Cause of Action, then NPCA will have the right to prove that TVA has violated the Act on a daily basis for more than twenty (20) years.

I think it can be said with reasonable certainty that these issues will not, at the end of the day, be decided by me. And, if any of the cases on my docket are so related and intertwined that it would be appropriate for them to be reviewed on appeal at or around the same time, it is this action and *Sierra Club v. TVA.* There is an identity of parties (NPCA not being a plaintiff in *Sierra Club v. TVA* is insignificant since Sierra Club is a plaintiff in both actions), the same TVA generating plant (Colbert) is involved in both actions, and the question for decision is the same: what are the CAA violations at TVA's Colbert plant that these plaintiffs will be permitted to attempt to prove, and, if the plaintiffs are successful, what are the appropriate remedies available for those violations?

And, while it may be irrelevant, I note that TVA operates in Tennessee, which is like Alabama in that it has adopted the 2% *de minimis* rule as a state regulation, but *not* as part of its SIP. *See National Parks Conservation Ass'n v. Tennessee Valley Authority,* 175 F.Supp.2d 1071 (E.D.Tenn.2001). NPCA did not appeal the dismissal of that case, which rested on the 2% *de minimis* rule. And the 11th Circuit is well aware of Tennessee's 2% *de minimis* rule, because *National Parks Conservation Ass'n v. Tennessee Valley Authority* was cited and discussed in

the summary judgment opinion that was reversed in part by *Sierra Club v. TVA*.Having said that, Tennessee is in the 6th, not the 11 th, Circuit, and the effect, if any, of *National Parks Conservation Ass'n v. TVA* is reserved to the court(s) in Tennessee.

Similarly, while TVA supplies electricity to Georgia, which is in the 11 th Circuit, TVA does not have any generating plants there. Georgia has a 40%, not 20%, opacity limit as part of its SIP. In a case decided after my entry of summary judgment in *Sierra Club v. TVA,* the Northern District of Georgia approved the use of COMS (referred to as "CEM" and "COM") in a CAA citizen suit to prove violations of the Georgia 40% opacity limit. *Sierra Club v. Georgia Power Co.*, 365 F.Supp.2d 1297 (N.D.Ga.2004)(*"Georgia Power"*). In its ruling, the *Georgia Power* court granted summary judgment to Sierra Club on thousands of violations of the CAA occurring at older coal-fired units at Georgia Power's Wansley plant, and set the matter for trial on remedies only. There is no mention of a 2% *de minimis* rule in *Georgia Power,* and there is no reported citation of *Georgia Power* after the December, 2004 Order described above.

For these reasons, and the reasons stated in the previous Orders on the First, Second, and Third Causes of Action (does. 213, 215 and 217), I find that there are no remaining issues before the court and that a final Order dismissing the action is due to be

entered.[9]

A separate Order will issue.

DONE this 17" day of January, 2006.

s/ VIRGINIA EMERSON HOPKINS
United States District Judge

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[9] Should the Orders in Doc.'s 213, 215, and 217 be reversed or modified, I would on remand, if it were still relevant, entertain a motion by NPCA to alter or amend the applicable judgment so as to permit NPCA to amend its Complaint to conform to the law of the case as stated by the 11th Circuit, should such an amendment be required to proceed.

UNITED STATES DISTRICT COURT, N.D. ALABAMA, NORTHWESTERN DIVISION.

NATIONAL PARKS CONSERVATION ASSOCIATION, INC. and SIERRA CLUB, Plaintiffs

v.

TENNESSEE VALLEY AUTHORITY Defendant.

No. Civ.A. 01-403-VEH.

Entered January 17th , 2006.

FINAL ORDER

HOPKINS, District Judge:

Plaintiffs National Parks Conservation Association, Inc. ("NPCA") and Sierra Club, Inc. ("Sierra Club") have filed an action under the citizen suit provision of the Clean Air Act ("CAA" "the Act"), 42 U.S.C. § 7604(a) (2000) which, in three (3) separate Causes of Action, asserts Tennessee Valley Authority ("TVA") violated the CAA by its 1982 work at the Colbert Unit 5 plant ("the work"). NPCA says the work constituted a "modification" under the CAA, triggering the New Source Performance Standards ("NSPS"), Non-Attainment New Source Review ("NNSR") and New Source Review ("NSR"), and Prevention of Significant Deterioration ("PSD") standards of the CAA. Second Amended Complaint ("SAC"). (Doc. 80.)

In the latter part of 2005, the court, acting on TVA motions that had been pending for some time,

entered orders on motions to dismiss filed by TVA where TVA sought judgment on all three (3) NPCA Causes of Action. *See* Doc. 213 and Doc. 215 (First and Second Causes of Action); Doc. 217 (Third Cause of Action).

For the reasons stated in the Memorandum Opinion of even date herewith, and the reasons stated in the previous Orders on the First, Second, and Third Causes of Action (docs. 213,215 and 217), I find that there are no remaining issues before the court and that a final Order dismissing the action is due to be entered, and it is hereby **ORDERED** that this action be, and hereby is, **DISMISSED with prejudice.**

This Order is **FINAL.**

DONE and **ORDERED** this 17th day of January, 2006.

s/ VIRGINIA EMERSON HOPKINS
United States District Judge

UNITED STATES DISTRICT COURT, N.D. ALABAMA, NORTHWESTERN DIVISION.

NATIONAL PARKS CONSERVATION ASSOCIATION, INC. and SIERRA CLUB, Plaintiffs

v.

TENNESSEE VALLEY AUTHORITY Defendant.

No. Civ.A. 01-403-VEH.

Entered December 21, 2005.

ORDER ON TENNESSEE VALLEY AUTHORITY MOTION TO DISMISS THIRD CAUSE OF ACTION
(Failure to Comply With Statutory Notice Requirements)

HOPKINS, District Judge:

Before the court is the Motion filed by Defendant Tennessee Valley Authority ("TVA") to dismiss the Third Cause of Action. (Doc. 96.) In the Third Cause of Action, Plaintiffs National Parks Conservation Association, Inc. ("NPCA") and Sierra Club, Inc. ("Sierra Club") allege TVA, at Unit No. 5 of its Colbert County coal-fired electricity generating facility, has violated the New Source Performance Standards ("NSPS") of the CAA on a daily basis for close to twenty (20) years.

TVA has moved to dismiss NPCA's Third Cause

of Action for failure to comply with pre-suit notification requirement applicable to citizen suits under the CAA. 42 U.S.C. 7604(b).

For the reasons stated in the Memorandum Opinion of even date, TVA's Motion to Dismiss the Third Cause of Action, which the court treats as a motion for summary judgment, is **GRANTED**. Judgment is hereby entered in favor of TVA and against NPCA as to the Third Cause of Action.

DONE and **ORDERED** on December 21, 2005.

s/ VIRGINIA EMERSON HOPKINS
United States District Judge

UNITED STATES DISTRICT COURT, N.D. ALABAMA, NORTHWESTERN DIVISION.

NATIONAL PARKS CONSERVATION ASSOCIATION, INC. and SIERRA CLUB, Plaintiffs

v.

TENNESSEE VALLEY AUTHORITY Defendant.

No. Civ.A. 01-403-VEH.

Entered December 21, 2005

MEMORANDUM OPINION ON TENNESSEE VALLEY AUTHORITY MOTION TO DISMISS THIRD CAUSE OF ACTION (Failure to Comply With Statutory Notice Requirements)

HOPKINS, District Judge:

Plaintiffs National Parks Conservation Association, Inc. ("NPCA") and Sierra Club, Inc. ("Sierra Club") have filed an action under the citizen suit provision of the Clean Air Act ("CAA" "the Act"), 42 U.S.C. § 7604(a) (2000) asserting Tennessee Valley Authority ("TVA") violated the CAA by its 1982 work at the Colbert Unit 5 plant ("the work"). NPCA[1] says the work constituted a "modification" under the CAA, triggering the New Source Performance Standards

[1] For economy's sake, "NPCA" shall mean "NPCA and Sierra Club" unless the context clearly indicates otherwise.

("NSPS"), Non-Attainment NSR ("NNSR")[2], and Prevention of Significant Deterioration ("PSD") standards of the CAA. Second Amended Complaint ("SAC"). (Doc. 80.)

I. ISSUE PRESENTED

In its Third Cause of Action, NPCA allegesTVA, at Colbert No. 5, has violated the New Source Performance Standards ("NSPS") of the CAA on a daily basis for close to twenty (20) years.

TVA has moved to dismiss NPCA's Third Cause of Action for failure to comply with the pre-suit notification requirement applicable to citizen suits under the CAA. 42 U.S.C. § 7604(b). Because TVA has filed exhibits in support of its Motion to Dismiss, the TVA motion will be also treated as a motion for summary judgment. After a review of the CAA, and discussion of citizen suits in the CAA and other statutes, the NPCA 60-day notice letter is reviewed and the legal issues raised by it are discussed. For the reasons stated in that review and discussion, I find the NPCA Notice letter is insufficient to give TVA the adequate notice required by the Act, requiring the Third Cause of Action to be dismissed.

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[2] The EPA has designated the counties around the Colbert Plant as meeting the NAAQS, see Plaintiffs' Memorandum in support of Motion for Partial Summary Judgment (standing), page 13, fn. 3. (Doc. 177.)

II. THE CLEAN AIR ACT

The Clean Air Act is codified at 42 U.S.C. §§7401-767 (2000). The implementing regulations are found at 40 C.F.R., pts. 50-99. The original Act and the amending legislation can be found, respectively, at Clean Air Act Amendment of 1970, Pub. L. No. 91-604,84 Stat. 1676 (1970); Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 685 (1977); Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 108 Stat. 2399 (1990).

> "New source review" denotes a series of provisions within the federal Clean Air Act (Act). Congress enacted the Clean Air Act in 1970, with major amendments occurring in 1977 and 1990. The Act represents one of the federal government's earliest efforts to protect the environment through a comprehensive regulatory scheme.
>
> The Clean Air Act requires the Environmental Protection Agency to establish baseline "national ambient air quality standards" (NAAQS), setting maximum permissible concentrations for "criteria" pollutants. The Act divides the United States into two types of regions: those that are currently in compliance with all of the NAAQS standards ("attainment areas"), and those that are violating some or all of these standards ("non-attainment areas"). The Act establishes different emissions requirements for facilities in each region, with stricter standards applicable

to facilities in non-attainment areas.

The 1977 Amendments to the Clean Air Act incorporated the new source review provisions. These provisions were designed to ensure that large industrial sources of air pollution included modern pollution-control equipment when they altered their facilities. New source review mandated that the "best" emissions-control technology be installed whenever a "major" source was built, replaced, or modified (creating, in NSR terminology, a "new source" of air pollution). NSR provides an exception to this best-technology requirement for some "routine maintenance" to major sources.

What qualifies as the "best" technology in turn depends on the ambient air quality in the surrounding region. Facilities seeking to build or modify equipment in attainment areas are subjected to "prevention of significant deterioration" (PSD) review. To proceed with their proposed projects,facilities must determine whether new or increased emissions resulting from these projects would cause the area to exceed ambient air quality standards or to suffer a "significant" deterioration in air quality. PSD review requires that any new source adhere to the "best available control technology" (BACT) standard, governing emissions of regulated pollutants. BACT, a source-specific standard, is generally understood to require the best

pollution-control technology available, after taking into account energy, economic and environmental considerations.

Facilities seeking to build or modify structures in NAAQS non-attainment areas are subject to more stringent requirements. These facilities must obtain pre-construction permits, certifying that pollution from any new source will not hinder the region's progress towards attainment of the NAAQS standards. New sources must install emissions-control equipment that meets the stringent "lowest achievable emissions rate" (LAER) standards. LAER standards are generally stricter than BACT standards, because they are set without any consideration of energy or economic factors. Facilities seeking to add sources in non-attainment areas must show, furthermore, that they plan to "offset" any projected emissions increases from these new or modified sources with emissions decreases in other areas of the same facility or from other facilities in the non-attainment area.

Martin, The Reform of New Source Review: Toward A More Balanced Approach, 23 Stan. Envtl. L.J. 35 1, 356-58 (2004) (citations omitted)

The Act establishes a program of "cooperative federalism" with a "division of labor between individual states and EPA" for the attainment and maintenance of national air quality goals. *Sierra Club v. EPA*, 315 F.3d 1295, 1300 (11th Cir. 2002). EPA's responsibility is to set air quality standards. For

pollutants meeting certain criteria, EPA is responsible for promulgating national ambient (i.e., outdoor) air quality standards ("NAAQS"). 42 U.S.C. § 7409(a) (2000). These standards must be sufficient to protect the public health (with an adequate margin of safety) and the public welfare (including effects on soils, water, vegetation, manmade materials, animals, visibility, etc.) from any known or anticipated adverse effects. 42 U.S.C. §§ 7409(b)(l) & (2) (2000); 42 U.S.C. § 7602(h) (2000). In turn, a state, to achieve national air quality standards, adopts an air quality plan known as a State Implementation Plan ("SIP") that controls emissions from specific sources. 42 U.S.C.§ 7410.

Both the CAA and the SIPS enacted by states regulate new and existing major stationary sources of air pollution differently. In general, ***new*** sources - i.e., sources constructed or "modified" after the effective date of the applicable statute or implementing regulation - must undergo preconstruction review and permitting and, as part of this permitting process, are required to install emission controls capable of meeting specified emission rates. The thinking at the time Congress chose to impose these obligations on new sources was that, as old plants were retired and new power plants built, the new plants or sources could incorporate these more stringent emissions controls into their design and construction more cost-effectively and efficiently than existing sources. *See, e.g.,* H.R. Rep. No. 95-294, 95th Cong., 1st Sess., at 185,

reprinted in 1977 U.S.C.C.A.N. 1077, 1264 (1977).[3]

There are three (3) separate new source programs under the CAA. The oldest of these is the federal New Source Performance Standards program (NSPS) enacted in 1970, 42 U.S.C. § 7411. The other two new source programs -Nonattainment New Source Review (NNSR) and Prevention of Significant Deterioration (PSD) - were enacted in 1977 and are companion programs that apply on a pollutant-by-pollutant basis depending on whether the source is located in an attainment area (PSD) or a nonattainrnent area (NNSR) for that pollutant. *See generally, TVA v. Whitman*, 336 F.3d 1236, 1244 nn.12-14 (1 lth Cir. 2003); *United States v. Duke Energy Corp.*, 278 F. Supp. 2d 61 9,627-30 (M.D.N.C.

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[3] Congress' reasoning was sound, the consequences most likely unintended. For a number of reasons, ranging from decreased demand for electricity, energy prices that were considerably lower than projected at the time (1970), to local opposition ("not in my back yard" or "NIMBY" litigation), and increased construction costs, there were very few new power plants built in the decades after enactment of the CAA, and the industry instead "stretched" the life expectancy of its facilities through "life extension" projects. This in turn led to litigation over what work at a given plant makes that plant or unit a "new source" and what work falls under the "routine maintenance and repair" exception and is therefore exempt from NSR/NNSR/PSD requirement and permitting. This tension is seen most recently in response to a series of 1999 enforcement actions filed by the EPA in the waning days of the second Clinton administration.

2003). The requirements of the Alabama PSD and NNSR provisions are triggered when a new source is built or when an existing major stationary source constructs a "major modification." See AAPCC Regulations 16.4.8 (Ex. 5 at 10) & 16.3.2(c) (Ex. 6 at 16-8). If triggered, these new source requirements require installation of pollution control equipment that represents best available control technology (BACT) (under the PSD program) or lowest achievable emission rate (LAER) (under the NNSR program).

Existing sources, by contrast, fall under other provisions of the Act. Existing sources are not required to install emission controls such as BACT or LAER unless, among other things, work performed there is a "major modification" as discussed above. The court does not understand NPCA to allege TVA has violated these provisions with respect to Colbert 5 except to the extent describe above, i.e., the failure to obtain the permits NPCA says were required by the work.[4] These include the emissions limitations and other requirements established by the states in their SIPS to achieve EPA's NAAQS, hazardous air pollutant standards, visibility protection programs, and acid rain control programs. 42 U.S.C. §§ 7410, 7412, 7491, 7492 & 7651-7651o (2000). TVA says, and NPCA agrees, that the area around the entire Colbert plan is in attainment of all national air quality standards and has been in attainment since the early 1990's.

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[4] As described *infra*, certain plants were, because of their age, "grandfathered". Colbert 5 is part of one such plant.

For further court discussions of the conflicts in CAA emissions enforcement, compare, e.g., *United States v. Ohio Edison*, 276 F.Supp. 2d 829 (S.D. Ohio 2003), with *United States v. Duke Energy Corp.*, 278 F.Supp. 2d 619 (M.D.N.C. 2003); and *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 90 1 (7" Cir. 1990) (" WEPCO "), with *US. v. Duke Energy*, 41 1 F.3d 539 (4th Cir. 2005). For the current state of emissions rules, and a comprehensive history of the various EPA emission rules and the litigation over those rules, see *NY v. US. EPA*, 413 F.3d 3 (D.C. Cir. 2005).

Turning to the interplay of the emissions limitations of the Clean Air Act, the emissions regulations promulgated thereunder by Alabama's Department of Environment Management ("ADEM"), and the effect of Alabama's CAA State Implementation Plan (SIP) on those regulations, reference is made to the Eleventh Circuit's November 22, 2005 decision in *Sierra Club v. TVA*, F.3d , Slip Opinion No. 04-1 5324,2005 WL 3110516 (11 th Cir., November 22, 2005), where the Court of Appeals, in an action also involving TVA's Colbert plant, affirmed in part, reversed in part, and remanded this Court's September 14, 2004 Memorandum Opinion and Order in *Sierra Club v. TVA*, No. CV-02-2279-VEH (TVA Ex. 31). (Inter alia, Alabama's ADEM 2% de minimis emissions rule violates the Act, and was never approved by the EPA and therefore never became part of Alabama's SIP). More on *Sierra Club v. TVA* later.[5]

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[5] Alabama's PSD program has also been recently reviewed by this court, *United States* v. *Alabama Power Co.*,

Earlier this year, prior to the Eleventh Circuit's opinion in Sierra Club v. TVA, supra, the D.C. Circuit rejected in part and sustained in part numerous challenges to the latest EPA emission rule ("the 2002 rules"). *NY v. US.* EPA, 413 F.3d 3 (D.C. Cir. 2005).

III. TVA's COLBERT UNIT 5

There is no dispute that Unit 5 of the Colbert plant was built before enactment of the new source provisions of the 1970 and 1977 CAA amendments, and falls under new source rules only if the unit underwent a "major modification." As already noted, NPCA says, and TVA denies, that the work done at Colbert Unit 5 in the early 1980s was a "major modification" that converted Colbert Unit 5 into a "new source."[6]

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372 F.Supp. 2d 1283 (N.D. Ala. 2005). Alabama's NNSR program is
similar.

[6] As noted in the court's Order on TVA Motion to Dismiss First and Second Causes of Action (Statute of Limitations), newspaper articles submitted in support of that Motion quote
TVA as saying the Colbert plant was poorly designed, out of service one-third (1/3) of the time, and the 1982 work was a "rehabilitation". TVA Ex.'s 16, 17 in support thereof.

IV. STANDARD OF REVIEW

Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings,depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000). The party asking for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings or filings which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party has met its burden, Rule 56(e) requires the non-moving party to go beyond the pleadings and, by its own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324.

The substantive law will identify which facts are material and which are irrelevant. *Chapman*, 229 F.3d at 1023; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the non-movant. *Chapman*, 229 F.3d at 1023; *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11 th Cir. 1993). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248; *Chapman*, 229 F.3d at 1023. If the evidence is merely colorable, or

is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249.

The method used by the party moving for summary judgment to discharge its initial burden depends on whether that party bears the burden of proof on the issue at trial. *See Fitzpatrick*, 2 F.3d at 1115- 17 *(citing US. v. Four Parcels ofReal Property*, 941 F.2d 1428 (11th Cir. 1991) (en banc)). If the moving party bears the burden of proof at trial, then it can only meet its initial burden on summary judgment by coming forward with positive evidence demonstrating the absence of a genuine issue of material fact; i.e. facts that would entitle it to a directed verdict if not controverted at trial. *Fitzpatrick*, 2 F.3d at 1115. Once the moving party makes such a showing, the burden shifts to the non-moving party to produce significant, probative evidence demonstrating a genuine issue for trial.

If the moving party does not bear the burden of proof at trial, it can satisfy its initial burden on summary judgment in either of two ways. First, the moving party may produce affirmative evidence negating a material fact, thus demonstrating that the non-moving party will be unable to prove its case at trial. Once the moving party satisfies its burden using this method, the non-moving party must respond with positive evidence sufficient to resist a motion for directed verdict at trial.

The second method by which the moving party who does not bear the burden of proof at trial can satisfy its initial burden on summary judgment is to

affirmatively show the absence of any evidence in the record in support of a judgment for the nonmoving party on the issue in question. This method requires more than a simple statement that the non-moving party cannot meet its burden at trial but does not require evidence negating the non-movant's claim; it simply requires the movant to point out to the court that there is an absence of evidence to support the non-moving party's case. Fitzpatrick, 2 F.3d at 1115-16. If the movant meets its initial burden by using this second method, the non-moving party may either point to evidence in the court record, overlooked or ignored by the movant, sufficient to withstand a directed verdict, or the non-moving party may come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency. However, when responding, the non-movant can no longer rest on mere allegations, but must set forth evidence of specific facts. *Lewis v. Casey*, 518 **U.S.** 343 (1996) (citing *Lujan v. Defenders of Wildlife*, 504 **U.S.** 555,561 (1992))

V. CITIZEN SUITS UNDER THE CLEAN AIR ACT

A. Notice Provisions Generally

Almost every major environmental law today has a provision allowing for suits brought by the public to enforce the terms of the statute.[7] The provisions are

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[7] *See, e.g.*, the Federal Water Pollution Control Act (the Clean Water Act), 33 U.S.C. § 1365; the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 7002; and the Comprehensive Environmental Response, Compensation, and

called citizen suit provisions, and they are designed to have several effects. As the name implies, these provisions are intended to allow for greater citizen participation in the enforcement of environmental laws. *See, Hallstrom v. Tillamook County*, 493 U.S. 20, 28, 110 S.Ct. 304, 309, 107 L.Ed.2d 237 (1989). Additionally, because these provisions generally, and the CAA specifically, allow for a lawsuit against the EPA Administrator for failing to fulfill his statutory duty, the provisions are intended to encourage statutory administrators and enforcers to fulfill those functions. *Id.* at 29, 110 S.Ct. at 3 10.

The Clean Air Act was the first piece of environmental legislation to contain a citizen suit provision, and was the basis for all notice provisions that were included in subsequent environmental statutes.[8] *Id.* at 28, 110 S.Ct. at 309.

B. Notice under the CAA

Liability Act (CERCLA), 42 U.S.C. § 9659. In fact, the only major environmental statute without a citizen suit provision is the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq.

[8] For this reason courts will often rely on case law interpreting the citizen suit provision of one particular statute in their interpretation of a different statute. The citizen suit provisions are essentially interchangeable. See, *Hallstrom* v. *Tillamook County,* 83 1 F.2d 889, 890 (9th Cir. 1987) ("Courts have construed [the notice provisions in different environmental statutes] identically ..."), *affd* 493 U.S. 20, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989).

The notice provision of the CAA, 42 U.S.C. § 7604(a), says:

> **(a) Authority to bring civil suit, jurisdiction**
>
> Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf-
>
> (1) against any person ... who is alleged to have violated ... or to be in violation of ... an emission standard or limitation under this chapter . . .

Although Congress clearly wanted to encourage citizen participation, there was an important and contrary concern that was also addressed in the legislation. *Hallstrom, supra,* at 29, 1 10 S.Ct. at 3 10. In order to prevent a tidal wave of citizen suits burdening government agencies as well as the federal courts, Congress included a requirement that citizens notify the alleged polluter, the state in which the alleged violation occurred, and the Administrator 60 days prior to bringing suit. 42 U.S.C. 7604(b). This requirement has several effects. First, it allows the appropriate agency to undertake enforcement action in the interim. *Hallstrom,* 493 U.S. at 29, 1 10 S.Ct. at 3 10. Additionally, the notice requirement provides a delay period in which the alleged violator can take steps in order to bring itself into compliance. *Id.; see also, Gwaltney of Smithfield* ***v.*** *Chesapeake Bay Foundation,* 484 U.S. 49, 60, 108 S.Ct. 376, 382, 98 L.Ed.2d 306 (1987).

Subsection (b) sets forth the notice requirement

for citizen suits brought under the Clean Air Act. According to that subsection:

> **(b) Notice**
>
> No action may be commenced-
>
> (1) under subsection (a)(1) of this section-
>
> (A) Prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard ...except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(i)(3)(A) or (f)(4) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

42 U.S.C. § 7604(b).

In 1989, the Supreme Court resolved a split in the circuits regarding the interpretation of the notice requirement found in environmental statutes. *Hallstrom,* 493 U.S. 20, 110 S.Ct. 304, 107 L.Ed.2d 237. Interpreting the notice provision in the RCRA (42 U.S.C. § 7002), the Court held that notice is a prerequisite to a citizen suit, although the court specifically stopped short of holding that giving notice

is actually jurisdictional. *Id.* at 31, 110 S.Ct. at 311.[9] Thus, based on *Hallstrom,* a citizen suit ordinarily may not be maintained unless the plaintiff provides the alleged violator, the State in which the violation occurred, and the Federal Government (the EPA Administrator) with notice of an intent to sue at least 60 days prior to filing the complaint.

As shown by the language of 42 U.S.C. § 7604(b) set out above, though, there are two exceptions to the 60-day notice requirement of the Clean Air Act. These are for suits brought for violations of section 7412(f)(4) and section 7412(i)(3)(A). NPCA does not allege this action falls under either provision.[10]

Until the 1990 Amendments to the Act, citizen suits were only permitted when the alleged violations continued till the date the action was filed. The rule barring wholly past violations was based on the Supreme Court's holding in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation,* 484 U.S. 49,57, 108 S.Ct. 376,381, 98 L.Ed.2d 306 (1987), interpreting the Clean Water Act's then-similar citizen suit provision. In 1990, the CAA was amended to permit citizen suits against any person "alleged to have violated (if there is evidence that the alleged violation

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[9] Other courts have done so, VII.A., *infra.*

[10] See, e.g. *Adair* v. *Troy State* Univ., 892 F.Supp. 1401 (M.D. Ala. 1995) (asbestos released during remodeling of a university building).

has been repeated) or to be in violation" (of the Act), 42 U.S.C. § 7604(a).[11] A plain reading of the CAA, as amended, indicates that the 1990 Amendments overruled *Gwaltney* with respect to wholly past violations. The CAA, therefore, permits citizen suits, like this one, for both continuing violations and wholly past violations, so long as the past violation occurred more than once. This interpretation has been accepted by several courts. *Atlantic States Legal Found. v. United Musical Instrs.*, 61 F.3d 473,477 (6th Cir. 1995) (in dicta: Congress passed 1990 Amendments "explicitly to allow citizen suits for purely historical violations"); *Glazer v. American Ecology Env. Sews. Corp.*, 894 F.Supp. 1029, 1037 (E.D.Tex. 1995) ("The 1990 amendments to the CAA add a basis for citizen suit jurisdiction"); *Adair v. Troy State Univ., supra* at 1409 (1990 Amendment "clearly includes past violations, so long as there is evidence that the violations were repeated"); *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Mfg. Co.*, 772 F.Supp. 745 (W.D.N.Y.1991) (same, in dicta). *See also* Daniel Riesel, *Citizen Suits and the Award of AttorneyslFees in Environmental Litigation,* C921 ALI-ABA 1073, 1126 (1994) (1990 Amendments "effectively reversed the holding in *Gwaltney");* Hon. Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990,* 21 Envt.L. 1721,1748 (1991) ("the 1990 Amendments for the first time explicitly provide that citizens can seek civil fines for both past

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[11] The original language only permitted suits against those "alleged to be in violation."

and current violations of the CAA"); David T. Buente, *Citizen Suits and the Clean Air Act Amendments of 1990: Closing the Enforcement Loop,* 21 Envt.L. 2233,2238 (1991) ("Congress partially overruled the Supreme Court's *Gwaltney* decision."). *See, e.g., Fried v. Sungard Recovery Services, Inc.* 916 F.Supp. 465,467-68 (E.D.Pa. 1 996).[12]

VI. NPCA's NOTICE LETTER

The NPCA October 30, 2000 Notice Letter ("NPCA letter"; "Notice letter"), Exhibit 1 to TVA's Brief in Support of Motion to Dismiss, alleges violations of the CAA at ten (10) different TVA coal-fired electricity generating plants in Tennessee, Alabama, and Kentucky. NPCA'sNotice letter for the Third Cause ofAction involves Colbert No. 5.

The Notice letter's first three (3) pages notify TVA of NPCA's intent to sue, identifies the ten plants, describes in a summary fashion the citizen suit provisions of the Act, and then provides background for the PSD/NSR violations. Much of that background has already been described earlier in this Opinion, and will not be repeated.

The specific violations alleged are summarized:

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[12] Of course, claims for past violations must still be timely, i.e. fall within the statute of limitations. Earlier, the court dismissed as time barred NPCA claims relating to TVA's alleged failure to obtain required PSD and NSR permits for the 198211 983 work at Colbert No.5.

Page 7, No. 8 - TVA has been in violation of the Act "every day after making numerous unpermitted modifications at Colbert Unit 5". The work was a major modification as defined in the Alabama SIP, and performed without a required PSD or NSR permit. "Further, since 1990 you have operated this unit without a PSD or NSR permit". TVA was required to use install BACT and LAER and, by continuing to operate without such permits, violate(ed)(s) the Act. Also alleged is a violation of the Alabama minor source construction permit rule.

Page 9, Section I1 - Colbert Unit 5 violated NSPS. NPCA says it did so because the work at Colbert 5 caused an increase in the maximum hourly emissions rate and therefore was a "modification". Accordingly Colbert 5 was "... required to meet all of the requirements of Subpart Da[13], and you have failed every day thereafter to do so."[14]

VII. DISCUSSION

A. Whether proper pre-suit notice is a jurisdictional prerequisite

As stated above, the notice provision of the CAA applicable to citizen suits, 42 U.S.C. § 7604(b),

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[13] 40 C.F.R. §§ 60.40a-49a (Subpart Da).

[14] Every day since 1983.

provides that no action may be commenced prior to 60 days after the plaintiff has given notice of the violation "to any alleged violator of the standard, limitation, or order ..." allegedly violated. Notice under this subsection must be given in the manner that the administrator of the EPA prescribes by regulation. The pertinent EPA regulation regarding the content of the required notices provides as follows:

> Notices to the Administrator, States, and alleged violators regarding violation of an emission standard or limitation ... shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order which has allegedly been violated, the activity alleged to be in violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name and address of the person giving the notice.

40 C.F.R. § 54.3(b) (2000).

The Supreme Court, in *Hallstrom*, decided in 1989, stopped short of holding that giving notice is actually jurisdictional. *Hallstrom*, 493 U.S. 20 at 31; 110 S.Ct. 304 at 311. And it was interpreting the notice provision in the RCRA (42 U.S.C. § 7002), not the CAA. The Court presumably was aware that at least one Circuit had already held that the notice requirements for citizen suits under the Clean Air Act are a jurisdictional prerequisite to suit and must be strictly complied with. *See, Walls v. Waste Resource Corporation,* 761 F.2d 311, 316-17 (6th Cir. 1985). The

Sixth Circuit Court of Appeals noted in a Clean Water Act (CWA) action that Congress required prior notice because citizen suits were intended to supplement, rather than to substitute for, governmental enforcement. The Sixth Circuit noted:

> [F]ar from being a mere formality, prior notice was viewed by Congress as crucial in defining the proper role of the citizen suit. The citizen suit notice provisions were intended to give the EPA an opportunity to resolve issues regarding the interpretation of complex environmental standards by negotiation, unhindered by the threat of an impending private lawsuit .... Congress evidently believed ... that the private lawsuit should be a supplemental enforcement tool, rather than a substitute for agency involvement.

Walls v. Waste Resource Corporation, 761 F.2d 311, 317 (6th Cir. 1985).

The Sixth Circuit has revisited the issue since *Hallstrom:* strict compliance with the statutory notice requirements is a mandatory jurisdictional prerequisite to maintaining suit under the CAA and similar environmental laws. *Greene v. Reilly,* 956 F.2d 593,594 (6th Cir. 1992). And, as always, it is the plaintiffs burden to establish the existence of subject matter jurisdiction. *Steel Company v. Citizens for a Better Environment,* 523 U.S. 83, 103-04, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

Because the court finds NPCA's Notice letter

insufficient under the facts of this action, it is not necessary to reach the jurisdictional question. The court does have some reservations about notice being a jurisdictional prerequisite: first, Congress could have explicitly said notice was jurisdictional, and did not say so; second, the Supreme Court could have said so and did not say so; third, making it jurisdictional arguably undercuts the Congressional rationale behind citizen suits, which was to allow private attorneys general to assist in enforcement of the Act. CAA cases are by definition highly technical actions to prepare and maintain. An unbending insistence that each offending pollutant be named, that the exact smokestack from which the pollutant was emitted be named, that every date of illegal emission be stated, and that the exact statutory and C.F.R. cite be supplied for each violation, seems onerous. Surely there is a better balance to be struck between allowing sweeping allegations of broad violations covering many years of alleged violations on the one hand, and what would amount to a "gotcha"[15] defense on the other if each and every detail of each and every violation were a minimal jurisdictional requirement.

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[15] By this term, the court means the assertion, usually from a plaintiff and not infrequently in a class action, of a minor, and very technical, violation of a statute, often accompanied by a huge number of claims that leverages the technical violation into a potential recovery in the millions, hundreds of millions, or billions, of dollars. It is only an impression, but the court has the impression of judicial reluctance to find either liability or massive damages when it comes to such claims. By the same token, a clearly expressed Congressional intent to permit citizen suits should not be subject to judicially created, and highly technical, door closings.

For purposes of this opinion it is sufficient to say that, because I hold that NPCA's Notice letter is insufficient, C., *infra*, the jurisdictional point does not have to be decided.[16]

B. Whether other barriers to citizen suits remain applicable to this action after ***Sierra*** Club v. ***TVA***

In the 1990 amendments to the Clean Air Act, Congress added several provisions to the Act which were intended to improve its enforceability. It gave courts the authority to impose civil penalties in citizen suits and required additional monitoring and reporting of emissions . 42 U.S.C. § 7604. The 1990 amendments also created a new permit program (Title V) modeled after the Clean Water Act. 42 U.S.C. §§ 7661-7661f.

Until recently, there were significant barriers to enforcement under the Clean Air Act that are not present in the Clean Water Act. *See* Hecker, The Difficulty of Citizen Enforcement of the Clean Air Act, 10 Widener Law Rev. 303 (2004). For example, an

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[16] This may appear backwards, since jurisdiction is always the point of departure in decision making in a court of limited jurisdiction. Holding that (proper) pre-suit notice was jurisdictional would render moot the sufficiency of the Notice letter. If the Notice letter is factually insufficient, i.e., it doesn't give the defendant the information required by the Act, then saying that notice deprives the court of jurisdiction over that claim doesn't advance the analysis and puts the court into making an unnecessary decision that, in my view, is more appropriately decided by a higher court.

enforcement action under the Clean Air Act may lead to a challenge by the defendant of the underlying permit because, unlike the Clean Water Act, the Clean Air Act does not include an antibacksliding or antidegradation provision. Thus, an otherwise straightforward enforcement case may turn into a battle of experts over what the proper permit (BACT or best available control technology) standard is for the plant.

Another significant difference between citizen suits under the CWA and the CAA is complexity of defenses based upon data quality and operational malfunctions. The discharge monitoring reports (DMRs) under the CWA are admissions of violations on the part of the discharger and are very difficult to challenge in an enforcement action. Under the CAA, "any credible evidence" may be used to challenge data quality. 42 U.S.C. § 7413(e); 40 C.F.R. § 60.11(g). TVA also has exemptions not available to CWA defendants: under the new source performance standards (NSPS) of the CAA, "[o]perations during periods of startup, shutdown, and malfunction shall not constitute representative performance unless otherwise specified in the applicable standard." 40 C.F.R. § 60.8(c). This standard invites significant factual disputes over what is representative operation and when a violation has occurred -- a far cry from the straightforward liability decisions based upon DMRs under the CWA.[17]

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[17] Citizen Suits and Defenses Against Them, SJ101 ALI-ABA 885 (2004), p.8.

With the Eleventh Circuit's decision in *Sierra Club v. TVA*, ___ F.3d ___ , Slip Opinion No. 04-1 5324,2005 WL 3110516 (11th Cir., November 22,2005), these enforcement defenses have lost traction. The Court of Appeals said that every time it can be shown with credible evidence that emissions from the Colbert TVA plant, which includes Colbert 5, fail to meet the 20% opacity requirement of the Act and the Alabama State Implementation Plan ("SIP"), the Colbert Plant is in violation of the Act.

Further, the Court of Appeals summarily rejected TVA's arguments, joined by the State of Alabama, that because COMS[18] permitted stricter emissions monitoring than the older Method 9 used by Alabama's ADEM, TVA needed the safe harbor provided by the 2% de minimis rule, or that, in the alternative, the 2% de minimis rule was a reasonable interpretation of the "credible evidence rule". [19] This

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[18] Continuous Opacity Monitoring System. "At the time this lawsuit was filed, the Colbert plant was operating under permits ADEM had issued in March 1998. One of the requirements of the Colbert plant's air permits is that TVA install, maintain, and operate a continuous opacity monitoring system ("COMS") in each of the plant's smokestacks. *See* Ala.Admin. Code r. 335-3-12-.02(3). As its name indicates, COMS is a device that monitors continuously the opacity of a plume of smoke." *Sierra Club v. TVA*, supra, slip opinion at 5.

[19] "Notwithstanding any other provision in [the ADEM regulations], any credible evidence or information relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test had been performed, can be used to establish

court's reliance on the "reasonable interpretation" argument, combined with deference this court thought was due ADEM's interpretation of the statute (CAA) it enforces, was explicitly rejected in *Sierra Club* v. *TVA, supra.* The Court of Appeals did not find any support for the argument that when EPA approved Alabama's SIP adoption of the "credible evidence" rule, EPA intended to modifL "implicitly and downward the 20% opacity limitation". (Slip Op. at 24) *Sierra Club v. TVA, supra,* says that the Act provides for continuous compliance, 42 U.S.C. 7602(k), and Alabama's "interpretation" of its SIP could not change the Act's mandate of continuous compliance.[20] *Id.*

The court is aware that Tennessee's SIP incorporates the 2% de minimis rule, just as it is aware that Georgia's SIP permits a forty per cent (40%) opacity ceiling, double the amount permitted by Alabama and Tennessee. This court has no power over these variances, and this court, after *Sierra Club v. TVA, supra,* doesn't have any questions about the effect of the 2% de minimis rule on emissions

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whether or not an owner or operator has violated or is in violation of any rule or standard in this Division." Ala. Admin. Code r. 335-3-1-.13(2).

[20] The court said "By using an informal, non-public, undocumented 'interpretation' method of revising the SIP before 2003, ADEM short-circuited the important protections against uninformed and arbitrary rulemaking, and it attempted to avoid entirely EPA oversight of the SIP process". Slip Opinion at 26.

violations (none) and whether or not exceeding the 20% opacity limitation violates the Act (it does).

C. Whether the NPCA Notice letter complies with the CAA

In *Nat 'l Parks Conservation v. TVA*, 175 F.Supp.2d 1071 (E.D. Tenn. 2001) ("*NPCA Tennessee*"), the district court dealt with the same parties (less Sierra Club, which in light of *Sierra Club v. TVA, supra*, is a distinction without a difference), similar TVA plants, and alleged CAA violations. However, the court reads the *NPCA Tennessee* notice letter as more detailed:

> The suit will allege that TVA, in its operation of the [Kingston or John Sevier] facility, has regularly violated for at least the last five years, and continues at the present time to violate: (1) the 20% opacity limit in the Tennessee State Implementation Plan [SIP], 40 CFR § 52.2220, *et seq.;* TAPCR 1200-3-5.0 l(1) and (2) the 20% opacity limit set forth in the federally applicable provisions of
> Condition 06 in [the facility's] Operating Permit.... The letters further stated that "[tlhe violations of the opacity limitations described above are demonstrated by data from continuous opacity monitors at the ... facility."

175 F. Supp. 2d 1071, 1076.

The *NPCA Tennessee* court said NPCA's notice was insufficient for a couple of reasons, the one

applicable here being the lack of specificity. Although the notice letter(s) did say that TVA had

> violated the 20% opacity limit in the Tennessee SIP, it (sic) did not specify the dates of the alleged violations or identify at which sites the violations occurred. Rather, the notice only states that TVA has "regularly violated" the standard "for at least the last five years....". Plaintiff has simply not provided the specificity in its notice which would be required for TVA to determine when its alleged unlawful exceedances had occurred.

175 F. Supp.2d at 1077.[21]

The court believes, like the *NPCA Tennessee* court, that NPCA's Notice letter is insufficient, and therefore NPCA's Third Cause of Action fails. NPCA's Notice letter, and its allegations set out at ¶¶ 86 - 91 of the Second Amended Complaint, of broad violations of nearly all, if not all, of the regulations of 40 C.F.R.

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[21] The court is not saying *NPCA Tennessee* is identical to this action. As noted above, Tennessee's SIP contains the 2% de minimis rule and TVA's Tennessee permit, as noted by the *NPCA Tennessee* court, is at least facially valid. *Cf.* Sierra Club v. TVA (EPA never approved the 2% de minimis standard, and it is not part of the Alabama SIP). Also, *NPCA Tennessee* attacked the state for issuing the permit, while here NPCA attacks TVA for not securing PSD and NSR permits before construction, and operating in violation of the Act thereafter.

subpart Da[22] on a daily basis for nearly twenty (20) years, are the notice equivalent of a "shotgun" complaint.[23]

CAA pre-suit notice is not analogous to "notice pleading" under the Rules of Civil Procedure. A defendant is entitled to "sufficient information to permit [it] to identify the specific standard . . . which has allegedly been violated. . . . [or] the date or dates of such violations." 40 C.F.R. § 54.3 (2004) The court agrees with TVA that NPCA had to do more than allege daily violations of 40 C.F.R. §§ 60.40a - 60.49a (Subpart Da). Those sections contain a number of requirements, and NPCA should have told TVA which ones it believed TVA had violated, or was continuing to violate. The best example of the reason for this requirement comes from page 12 of NPCA's Response and Opposition, where NPCA says that it is not pursuing TVA for violations of each of three (3) different NSPS emissions rates, but only for alleged SO, NSPS emission rate violations. This "amendment" to the Notice letter comes years after the fact. With only sixty (60) days to comply, in a capital intensive,

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[22] 40 C.F.R. §§ 60.40a - 60.49a (Subpart Da)

[23] Such complaints are disfavored. *E.g., Strategic Income Fund, L.L.C. v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1295 - 1296 (1 lth Cir. 2002). ("The typical shotgun complaint contains several counts, each one incorporating by reference the allegations of its predecessors, leading to a situation where most of the counts (i.e., all but the first) contain irrelevant factual allegations and legal conclusions. Consequently, in ruling on the sufficiency of a claim, the trial court must sift out the irrelevancies, a task that can be quite onerous.")

highly regulated and highly technical industry, TVA was entitled to more specific information that was sufficient to put it on notice of what it was doing wrong, so it could either attempt to come into compliance, or decide not to and take its chances were it sued. In the example quoted above, TVA should not have had to decide whether the Notice letter was directed at all three (3) pollutants, or one (1) or two (2). This case is not analogous to the CWA cases where a plaintiff demands a defendant stop discharging a specific pollutant into a waterway; there the defendant knows what it's said to be doing wrong and has the opportunity, if in fact it is violating the law, to modify its processes accordingly.

At its core, NPCA's Notice letter, Complaint, and Second Amended Complaint are inextricably tied to TVA's failure to obtain the permits NPCA says were required for the 1982/1983 work at Colbert No. 5. The court cannot read into any of those documents what the court, and everyone else, now knows is the violation that NPCA can prove: Colbert violates the 20% opacity limits as shown by COMS data, and has been doing so regularly since May 20, 1999.[24] *Sierra*

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[24] The Alabama credible evidence rule's effective date in the ADEM regulations was May 20, 1999. However, EPA's approval of the Alabama credible evidence rule took effect January 3,2000, which is the date the rule became a part of the Alabama SIP. Approval and Promulgation of Implementation Plans: Revisions to the Alabama Department of Environmental Management (ADEM) Administrative Code for the Air Pollution Control Program, 64 Fed. Reg. at 59,633. *Sierra Club v. TVA*, fnote 6. The court reads footnote 6 of *Sierra Club* v. *TVA* as saying it is the date the credible evidence rule became part of Alabama's SIP, January 3,2000, not the day ADEM made it effective, May

Club v. *TVA, supra.*

VIII. SUMMARY

NPCA's Notice Letter is insufficient, and the Third Cause of Action may not proceed to trial. In light of Sierra *Club* v. TVA, supra, this may not matter since NPCA cannot obtain civil penalties, and any injunctive relief obtained in *Sierra Club v. TVA* would apply equally here given the identity of parties and the TVA facility involved. Unless NPCA has credible evidence that was not available in *Sierra Club v. TVA*, the periods of provable violations (beginning May 20, 1999 or January 3, 2000 and coming forward) will also be the same, and the relief available in *Sierra Club v. TVA* appears to cover, if not exceed, the relief available to NPCA here should NPCA prevail on all remaining claims.

For the reasons stated, TVA's Motion To Dismiss the Third Cause of Action for NPCA's failure to properly comply with the citizen suit notice provisions of the CAA, which the court treats as a motion for summary judgment, is due to be **GRANTED.**

A separate Order will issue.

Done on December 21,2005.

s/ VIRGINIA EMERSON HOPKINS
United States District Judge

20, 1999, that counts.

UNITED STATES DISTRICT COURT, N.D. ALABAMA, NORTHWESTERN DIVISION.

NATIONAL PARKS CONSERVATION ASSOCIATION, INC. and SIERRA CLUB, Plaintiffs

v.

TENNESSEE VALLEY AUTHORITY Defendant.

No. Civ.A. 01-403-VEH.

Entered December 8, 2005

ORDER AMENDING JUDGMENT ORDER OF NOVEMBER 29, 2005

HOPKINS, District Judge:

The court has received and reviewed Plaintiffs National Parks Conservation Association, Inc. ("NPCA") and Sierra Club, Inc. ("Sierra Club")[1] Unopposed Motion to Alter or Amend Judgment ("NPCA Motion"). (Doc. 214) The NPCA Motion seeks corrections to, and clarification of, the Memorandum Opinion and Order entered on November 29, 2005. (Doc.'s 212 & 213).

After such review, it is hereby **ORDERED** that:

1. Footnote 23, at page 34 of the Memorandum

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[1] For economy's sake, "NPCA" shall mean "NPCA and Sierra Club" unless the context clearly indicates otherwise.

Opinion is amended by striking the term ("COMS") and substituting ("CMS") in its place.

2. Page 35, line 6 of the Memorandum Opinion is amended by striking the term COMS and substituting CMS in its place.

Clarification

NPCA seeks clarification of the effect of the November 29, 2005, Memorandum Opinion and Order on NPCA's First and Second Causes of Action. NPCA understands them to say that only NPCA's claims for civil penalties were dismissed and its claims for injunctive relief and attorney's fees and costs remain viable and pending for trial. TVA's reading, as reported by NPCA, is that the November 29, 2005, Memorandum Opinion and Order dismissed all relief sought in the First and Second Claims.

TVA's Motion, and the November 29, 2005, Memorandum Opinion and Order were directed at the First and Second Causes of Action; the Third Cause of Action was not involved.[2]

The language in question was not intended to be capable of two (2) plausible constructions. In its November 29, 2005, Memorandum Opinion and Order,

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[2] Still pending is TVA's Motion to Dismiss Plaintiffs' Third Cause of Action for Failure to Comply With Statutory Notice Requirements. (Doc. 96) That claim asserts, *inter alia*, that TVA's operation of Colbert 5 violates the Clean Air Act. *Sierra Club v. TVA, infra*, says the same thing.

the court implicitly, if not explicitly, anticipated the mandate in *See Sierra Club v. TVA, supra* will issue without substantive changes to the panel's November 22, 2005, Opinion.

It explicitly said it will, upon receipt of the mandate, consolidate *Sierra Club v. TVA, supra*, with this action.

Sierra Club v. TVA, supra, bars the imposition of civil penalties on TVA. The statute of limitations has run on CAA violations associated with the 1982 - 1983 construction work at Colbert 5.

Further proceedings in *Sierra Club v. TVA, supra*, will involve implementing the Court of Appeals' ruling therein, and the relief ordered therein will overlap, to a considerable degree, with the relief in this action. In the court's eyes, the Court of Appeals having spoken to the issue of liability, the proceedings going forward will involve remedies.

Further, if what NPCA was asking in its Motion was whether the court was going to order TVA to comply with the CAA emission rules in effect in 1982, 1983, or some period between then and the filing of this action, the court has not reached that issue, nor does it believe it should. If that is an issue between the parties, i.e., if TVA and Sierra Club disagree over the emissions limits applicable in *Sierra Club v. TVA, supra*, and this action, they should seek clarification from the Court of Appeals before the mandate issues because, as Sierra Club and TVA agreed, and the Court of Appeals ruled, if the 2% *de minimis* rule did

not apply to the Colbert plant (and it did not), there were "plenty" of CAA violations, and that COMS data could be used as proof of those violations from May 20, 1999, forward.[3]

Having said that, to eliminate any doubt about the November 29, 2005, Order, the language at the bottom of page 1 and top of page 2 that says

> "**GRANTED** on the grounds of the running of the statute of limitations as to all claims under the Clean Air Act asserting that the 1982 and 1983 construction work at TVA's Colbert County Plant Unit No. 5 violated the Clean Air Act, and **DENIED** as to all claims for declaratory relief, injunctive relief, attorneys' fees, and costs."

is struck and replaced by:

> "**GRANTED** on the grounds of the running of the statute of limitations as to all claims under the Clean Air Act, including the PSD and NNSR claims, asserting that the 1982 and 1983 construction work at TVA's Colbert County Plant Unit No. 5 violated the Clean Air Act[4], but

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[3] This is not to say that NPCA is foreclosed from proving violations predating May 20, 1999, it is simply a reflection of the proof available in *Sierra Club v. TVA, supra.*

[4] Because the statute of limitations has run on the NNSR and PSD claims, the court did not rule on whether the work (as that term is used in its Memorandum Opinion) at Colbert 5 was

DENIED without prejudice to NPCA's right to assert claim(s) for declaratory relief, injunctive relief, attorneys' fees, and costs where any such claim

- falls within the five (5) year statute of limitations preceding the filing of this action; and

- asserts that TVA operations of Colbert 5 violate the Clean Air Act. *See Sierra Club v. TVA*, ____ F.3d _____, No. 04-15324, 2005 WL 3110516 (11th Cir. 2005)."

Done on December 8, 2005.

s/ VIRGINIA EMERSON HOPKINS
United States District Judge

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a major modification triggering NNSR and PSD requirements on the one hand, or routine maintenance and repair ("RMRR") on the other. It did note, in reviewing TVA Exhibit 26, that TVA, at the time, called the work a "rehabilitation", and in Exhibit 17, a newspaper article, based on TVA information, said the Colbert plant was "poorly designed" and out or down one-third (1/3) of the time.

UNITED STATES DISTRICT COURT, N.D. ALABAMA, NORTHWESTERN DIVISION.

NATIONAL PARKS CONSERVATION ASSOCIATION, INC. and SIERRA CLUB, Plaintiffs

v.

TENNESSEE VALLEY AUTHORITY Defendant.

No. Civ.A. 01-403-VEH.

Entered November 29, 2005

ORDER ON MOTION TVA MOTION FOR PARTIAL SUMMARY JUDGMENT (FIRST AND SECOND CAUSES OF ACTION - STATUTE OF LIMITATION)

HOPKINS, District Judge:

For the reasons stated in the Memorandum Opinion of even date herewith, TVA's Motion For Partial Summary Judgment on the First and Second Causes of Action based on the running of the Statute of Limitations, doc. 99, will be construed as a Motion For Summary Judgment on the grounds of sovereign immunity and the running of the statute of limitations, and having been so construed,

TVA's Motion is **GRANTED** as to all claims for civil penalties sought to be assessed against TVA on the grounds of sovereign immunity because the United States has not waived sovereign immunity under the Clean Air Act, 42 U.S.C. § 7401 *et seq.* (2000), **GRANTED** on the grounds of the running of the

statute of limitations as to all claims under the Clean Air Act asserting that the 1982 and 1983 construction work at TVA's Colbert County Plant Unit No. 5 violated the Clean Air Act, and **DENIED** as to all claims for declaratory relief, injunctive relief, attorneys' fees, and costs.

When the mandate in *Sierra Club v. TVA*, ___ F.3d ___ , Slip Opinion No. 04-15324, 2005 WL 3110516 (11th Cir., November 22, 2005) is received from the Court of Appeals, a separate Order will be entered consolidating this action with that action.

Done on November 29th, 2005.

s/ VIRGINIA EMERSON HOPKINS
United States District Judge

UNITED STATES DISTRICT COURT, N.D. ALABAMA, NORTHWESTERN DIVISION.

NATIONAL PARKS CONSERVATION ASSOCIATION, INC. and SIERRA CLUB, Plaintiffs
v.
TENNESSEE VALLEY AUTHORITY Defendant.

No. Civ.A. 01-403-VEH.

Entered November 29, 2005

MEMORANDUM OPINION ON TVA MOTION FOR PARTIAL SUMMARY JUDGMENT (FIRST AND SECOND CAUSES OF ACTION - STATUTE OF LIMITATION)

HOPKINS, District Judge:

Plaintiffs National Parks Conservation Association, Inc. ("NPCA") and Sierra Club, Inc. ("Sierra Club") have filed an action under the citizen suit provision, 42 U.S.C. § 7604(a) of the Clean Air Act ("CAA", "the Act"), 42 U.S.C. § 7401 *et seq.* (2000), asserting Tennessee Valley Authority ("TVA") violated the CAA by its 1982 construction work ("the work") at Unit 5 of TVA's Colbert County electricity generating plant ("Colbert 5"). [1] The allegations at issue are found in NPCA's Second Amended Complaint ("SAC"). (Doc. 80)

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[1] For economy's sake, "NPCA" shall mean "NPCA and Sierra Club" unless the context clearly indicates otherwise.

The court has before it TVA's Motion for Partial Summary Judgment (doc. 99) ("the TVA motion"), brief (doc. 100), and supporting exhibits (doc. 101) seeking entry of judgment in favor of TVA and against NPCA on the First and Second Causes of Action because, TVA says, the statute of limitations has expired. NPCA has filed an Opposition with supporting exhibits. (Doc. 104) TVA has filed its Reply to the NPCA opposition, with additional exhibits. (Doc. 142) TVA filed supplemental case law authority (doc. 145), as did NPCA (doc. 207), and TVA responded with additional supplementary authority (doc. 208). The applicable statute of limitations is five (5) years, 28 U.S.C. § 2462[2], the "general" statute of limitations.

In the First Cause of Action, ¶¶ 1 - 72, , which NPCA calls "The PSD Violations," NPCA claims the work at Colbert 5 constituted a "'major' modification"[3] as defined by the Act, 42 U.S.C. § 7411(a), and the Alabama State Implementation

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[2] "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date the claim first accrued ..."

[3] The definition section quoted by NPCA in the SAC says "modification", not "major modification", *see* 42 U.S.C. § 7411(a)(5).

Plan ("SIP")[4], 42 C.F.R. § 52.69(c)(32), and Alabama Air Pollution Control Commission ("AAPCC") Regulation 16.4.2(b)(1). NPCA says the work at Colbert 5 created a potential for significant net emissions increase of particulate matter ("PM"), nitrogen dioxide ("NOx"), and sulfur dioxide (SO2).[5] Further, the work was performed without a Prevention of Significant Deterioration ("PSD") Permit, and the Best Available Control Technology ("BACT") was not used. NPCA says the failure to obtain the PSD permit at the time of the work and operating without it since violate the Act.

The Second Cause of Action, ¶¶ 1 - 80, which NPCA calls "The NSR Violations", alleges a violation of the Nonattainment New Source Review ("NNSR") provisions of the Act, the CFR regulations and the AAPC regulations. NPCA says Colbert 5 was, from 1980 to 1993, located in a "Nonattainment" area for SO2, and that the work increased potential SO2 emission by one hundred (100) tons per year or more. As a consequence, TVA was required to, but did not, obtain a Nonattainment NSR permit, and has been operating since in violation of the Act. As part of the

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[4] This term and the many other acronyms used in this opinion, the parties' pleadings, and the case law, are discussed and defined in Parts I. and II., *infra*.

[5] Three criteria pollutants – particulate matter (PM), nitrogen dioxide (NO2; more generally, all oxides of nitrogen are known as NOx) and sulfur dioxide (SO2) – are at issue in this case.

required NNSR permit, TVA should have installed appropriate air pollution controls to achieve and maintain the lowest achievable emissions rate ("LAER")[6].

Before turning to the issues before it, there will be a general overview of the Act (Section "I"), followed by a detailed history, lifted from *New York v. US EPA*, 413 F.3d 3 (D.C. Cir. 2005), of the legal and regulatory history of the emissions regulations (Section "II").

I. THE CLEAN AIR ACT

The Clean Air Act is codified at 42 U.S.C. §§ 7401-767 (2000). The implementing regulations are found at 40 C.F.R., pts. 50-99. The original Act and the amending legislation can be found, respectively, at Clean Air Act Amendment of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970); Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 685 (1977); Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 108 Stat. 2399 (1990).

> "New source review" denotes a series of provisions within the federal Clean Air Act

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[6] In areas that meet NAAQS ("attainment" areas) , the Act requires the use of BACT. In nonattainment areas, the more stringent LAER is triggered. As noted, Colbert 5 was partially nonattainment during some of the years covered by NPCA's Second Amended Complaint. These matters are discussed in more detail in I. and II., *infra*.

(Act). Congress enacted the Clean Air Act in 1970, with major amendments occurring in 1977 and 1990. The Act represents one of the federal government's earliest efforts to protect the environment through a comprehensive regulatory scheme.

The Clean Air Act requires the Environmental Protection Agency to establish baseline "national ambient air quality standards" (NAAQS), setting maximum permissible concentrations for "criteria" pollutants. The Act divides the United States into two types of regions: those that are currently in compliance with all of the NAAQS standards ("attainment areas"), and those that are violating some or all of these standards ("non-attainment areas"). The Act establishes different emissions requirements for facilities in each region, with stricter standards applicable to facilities in non-attainment areas.

The 1977 Amendments to the Clean Air Act incorporated the new source review provisions. These provisions were designed to ensure that large industrial sources of air pollution included modern pollution-control equipment when they altered their facilities. New source review mandated that the "best" emissions-control technology be installed whenever a "major" source were built, replaced, or modified (creating, in NSR terminology, a "new source" of air pollution). NSR provides an exception to this best-technology requirement for some "routine

maintenance" to major sources.

What qualifies as the "best" technology in turn depends on the ambient air quality in the surrounding region. Facilities seeking to build or modify equipment in attainment areas are subjected to "prevention of significant deterioration" (PSD) review. To proceed with their proposed projects, facilities must determine whether new or increased emissions resulting from these projects would cause the area to exceed ambient air quality standards or to suffer a "significant" deterioration in air quality. PSD review requires that any new source adhere to the "best available control technology" (BACT) standard, governing emissions of regulated pollutants. BACT, a source-specific standard, is generally understood to require the best pollution-control technology available, after taking into account energy, economic and environmental considerations.

Facilities seeking to build or modify structures in NAAQS non-attainment areas are subject to more stringent requirements. These facilities must obtain pre-construction permits, certifying that pollution from any new source will not hinder the region's progress towards attainment of the NAAQS standards. New sources must install emissions-control equipment that meets the stringent "lowest achievable emissions rate" (LAER) standards. LAER standards are generally stricter than BACT standards,

> because they are set without any consideration of energy or economic factors. Facilities seeking to add sources in non-attainment areas must show, furthermore, that they plan to "offset" any projected emissions increases from these new or modified sources with emissions decreases in other areas of the same facility or from other facilities in the non-attainment area.

Martin, The Reform of New Source Review: Toward A More Balanced Approach, 23 Stan. Envtl. L.J. 351, 356-58 (2004) (citations omitted)

The Act establishes a program of "cooperative federalism" with a "division of labor between individual states and EPA" for the attainment and maintenance of national air quality goals. *Sierra Club v. EPA*, 315 F.3d 1295, 1300 (11th Cir. 2002). EPA's responsibility is to set air quality standards. For pollutants meeting certain criteria, EPA is responsible for promulgating national ambient (i.e., outdoor) air quality standards, ("NAAQS"). 42 U.S.C. § 7409(a) (2000). These standards must be sufficient to protect the public health (with an adequate margin of safety) and the public welfare (including effects on soils, water, vegetation, manmade materials, animals, visibility, etc.) from any known or anticipated adverse effects. 42 U.S.C. §§ 7409(b)(1) & (2) (2000); 42 U.S.C. § 7602(h) (2000). In turn, a state, to achieve national air quality standards, adopts an air quality plan known as a State Implementation Plan ("SIP") that controls emissions from specific sources. 42 U.S.C. § 7410.

Both the CAA and the SIPs enacted by states regulate new and existing major stationary sources of air pollution differently. In general, *new* sources – i.e., sources constructed or "modified" after the effective date of the applicable statute or implementing regulation – must undergo preconstruction review and permitting, and, as part of this permitting process, are required to install emission controls capable of meeting specified emission rates. The thinking at the time Congress chose to impose these obligations on new sources was that, as old plants were retired and new power plants built, the new plants or sources could incorporate these more stringent emissions controls into their design and construction more cost-effectively and efficiently than existing sources. *ee, e.g.,* H.R. Rep. No. 95-294, 95th Cong., 1st Sess., at 185, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1264 (1977).[7]

There are three (3) separate new source

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[7] Congress' reasoning was sound; the consequences most likely unintended. For a number of reasons, ranging from decreased demand for electricity, energy prices that were considerably lower than projected at the time (1970), to local opposition ("not in my back yard" or "NIMBY" litigation), and increased construction costs, there were very few new power plants built in the decades after enactment of the CAA, and the industry instead "stretched" the life expectancy of its facilities through "life extension" projects. This in turn led to litigation over what work at a given plant makes that plant or unit a "new source" and what work falls under the "routine maintenance andrepair" exception and is therefore exempt from NSR/NNSR/PSD requirements and permitting. This tension is seen most recently in response to a series of 1999 enforcement actions filed by the EPA in the waning days of the second Clinton administration.

programs under the CAA. The oldest of these is the federal New Source Performance Standards program (NSPS) enacted in 1970, 42 U.S.C. § 7411. The other two new source programs – Nonattainment New Source Review (NNSR) and Prevention of Significant Deterioration (PSD) – were enacted in 1977 and are companion programs that apply on a pollutant-by-pollutant basis depending on whether the source is located in an attainment area (PSD) or a nonattainment area (NNSR) for that pollutant. *See generally, TVA v. Whitman*, 336 F.3d 1236, 1244 nn.12-14 (11th Cir. 2003); *United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 627-30 (M.D.N.C. 2003). The requirements of the Alabama PSD and NNSR provisions are triggered when a new source is built or when an existing major stationary source constructs a "major modification." *See* AAPCC Regulations 16.4.8 (Ex. 5 at 10) & 16.3.2(c) (Ex. 6 at 16-8). If triggered, these new source requirements require installation of pollution control equipment that represents best available control technology (BACT) (under the PSD program) or lowest achievable emission rate (LAER) (under the NNSR program).

Existing sources, by contrast, fall under other provisions of the Act. Existing sources are not required to install emission controls such as BACT or LAER unless, among other things, work performed there is a "major modification" as discussed above. The court does not understand NPCA to allege TVA has violated these provisions with respect to Colbert 5 except to the extent describe above, i.e., the failure to obtain the

permits NPCA says were required by the work.[8] These include the emissions limitations and other requirements established by the states in their SIPsto achieve EPA's NAAQS, hazardous air pollutant standards, visibility protection programs, and acid rain control programs. 42 U.S.C. §§ 7410, 7412, 7491, 7492 & 7651-7651o (2000). TVA says, and NPCA agrees, that the area around the entire Colbert plan is in attainment of all national air quality standards and has been in attainment since the early 1990's. Undisputed fact 17, SAC ¶¶ 18 -19.

For further discussion of the interplay see II, *infra*, and *compare, e.g., United States v. Ohio Edison*, 276 F.Supp. 2d 829 (S.D. Ohio 2003), with *United States v. Duke Energy Corp.*, 278 F.Supp. 2d 619 (M.D.N.C. 2003); and *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990) ("*WEPCO*"), with *U.S. v. Duke Energy*, 411 F.3d 539 (4th Cir. 2005).

As to the interplay of the emissions limitations of the Clean Air Act, Alabama's emissions regulations promulgated thereunder, and the effect of Alabama's State Implementation Plan (SIP) on those regulations, reference is made to the Eleventh Circuit's decision in *Sierra Club v. TVA*, ___ F.3d ___,Slip Opinion No. 04-15324, 2005 WL 3110516 (11th Cir., November 22, 2005), where the Court of Appeals, in an action also involving TVA's Colbert plant, affirmed in part, reversed in part, and remanded this Court's

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[8] As described in II., *infra*, certain plants were, because of their age, "grandfathered". Colbert 5 is part of one such plant.

September 14, 2004 Memorandum Opinion and Order in *Sierra Club v. TVA*, No. CV-02-2279-VEH (TVA Ex. 31). (*Inter alia*, Alabama's ADEM 2% de minimis emissions rule violates the Act, was never approved by the EPA, and therefore never became part of Alabama's SIP). More on *Sierra Club v. TVA* later.

Alabama's PSD program has also been recently reviewed by this court, *United States v. Alabama Power Co.*, 372 F.Supp. 2d 1283 (N.D. Ala. 2005). Alabama's NNSR program is similar.

II. The Regulatory and Litigation History Of The CAA Emission Rules

With Section I., above, as an overview, the court turns to the D.C. Circuit's recent capsulation of the applicable CAA amendments, EPA's various sets of rules governing emissions from various sources, and the interplay of Congressional action, EPA's responses, and industry's litigation challenges to EPA's actions through the various sets of rules:

Congress passed the 1970 amendments "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b). The amendments set out a two-step process for achieving this goal: EPA first develops "National Ambient Air Quality Standards" ("NAAQS") for various pollutants, and states then create and implement plans, known as "State Implementation Plans" ("SIPs"), to ensure their air meets these standards. *See id.* §§ 7409-7410.

The amendments also required new or modified sources to conform to emissions limits, known as "New Source Performance Standards" ("NSPS"), set by EPA. *See id.* § 7411. Because "[t]he Act contemplated" that these criteria would be "more stringent than those needed to meet ... NAAQS," *Alabama Power Co. v. Costle,* 636 F.2d 323, 346 (D.C.Cir.1979), the meaning of "modified sources" took on particular significance: if an existing source made a "modification," it needed to conform its change to NSPS, whereas an unmodified source only needed to meet whatever lesser requirements (if any) the SIP imposed for attaining NAAQS. Congress provided the following definition for "modification":

> any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

42 U.S.C. § 7411(a)(4). This definition requires *both* a change--whether physical or operational--*and* a resulting increase in emissions of a pollutant.

EPA's 1975 NSPS regulation, like its earlier 1971 regulation, elaborated upon this statutory definition, doing so in provisions whose meaning the parties debate today. One part of the 1975 regulation provided that " '[m]odification' means any physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant (to which a standard applies) emitted into

the atmosphere by that facility." 40 Fed.Reg. 58,416, 58,418 (Dec. 16, 1975); *see also* 36 Fed.Reg. 24,876, 24,877 (Dec. 23, 1971). Using somewhat different terms, another part of the 1975 regulation stated that "any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning ... of the Act," with "[e]mission rate ... expressed as kg/hr of any pollutant discharged into *12 the atmosphere." 40 Fed.Reg. at 58,419. Yet neither the 1975 regulation nor its preamble explained why EPA found it necessary to offer these two separate glosses on "modification."

Adding to the confusion, EPA put forth yet another definition of "modification" in a 1974 regulation implementing what became known as the regulatory "Prevention of Significant Deterioration" ("PSD") program. Seeking to prevent backsliding inregions whose air quality met NAAQS, this program required new sources and sources undertaking modifications to obtain preconstruction permits. *See Alabama Power,* 636 F.2d at 346-49 (describing the regulatory PSD program). The regulation defined "modification" in a manner that closely tracked--but didn't precisely mirror--the NSPS regulatory definition, stating that "[t]he phrases 'modification' or 'modified source' mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated." 39 Fed.Reg. 42,510, 42,514 (Dec. 5, 1974). The regulation's preamble further provided that

the term "modified source" was meant "to be consistent with the definition used in [NSPS]." *Id.* at 42,513.

Both the NSPS and PSD regulations listed certain exceptions to what constitutes a "modification," though once again the precise content of the regulations varied. The 1974 PSD and the 1971 NSPS regulations provided that:

> (1) Routine maintenance, repair, and replacement shall not be considered a physical change, and (2) The following shall not be considered a change in the method of operation: (I) An increase in the production rate, if such increase does not exceed the operating design capacity of the source; (ii) An increase in the hours of operation; (iii) Use of an alternative fuel or raw material [under certain conditions].

Id. at 42,514; *accord* 36 Fed.Reg. at 24,877. The 1975 NSPS regulation not only phrased its exceptions differently, but also added a few additional ones:

> The following shall not, by themselves, be considered modifications under this part: (1) Maintenance, repair, and replacement which the Administrator determines to be routine ...; (2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on the stationary source containing that facility; (3) An increase in the hours of operation; (4) Use of an alternative fuel or raw material [under certain conditions] ...; (5) The addition or use of any

> system whose primary function is the reduction of air pollutants ...; (6) The relocation or change in ownership of an existing facility.

40 Fed.Reg. at 58,419-20.

In its various permutations, this regulatory framework had not been long in place when, in 1977, Congress amended the CAA yet again. These amendments drew upon, expanded, and superceded the regulatory PSD program. In particular, the amendments strengthened the Act by (1) expressly creating a preconstruction review process for new or modified major sources located in "nonattainment" areas (i.e., areas which failed to meet NAAQS), *see generally* 42 U.S.C. §§ 7501-7515; and (2) expressly providing a parallel preconstruction review process in PSD areas (i.e., areas which met NAAQS or where there was insufficient information to evaluate whether NAAQS were met), *see generally id.* §§ 7470-7492. The parties refer to the first as "Nonattainment New Source Review" ("NNSR"), to the second as "Prevention of Significant Deterioration" ("PSD"), and to both collectively as "New Source Review" ("NSR"). We shall do the same.

Under the amendments, sources seeking NNSR permits must meet stricter requirements than sources seeking PSD permits. Most notably, for NNSR permits, sources must achieve the "lowest achievable emission rate" ("LAER") for new or modified units, whereas sources seeking PSD permits need only use the less demanding "best available control technology" ("BACT"). At a minimum, LAER and BACT are as

restrictive as NSPS. *Id.* § 7479(3) ("In no event shall application of [BACT] result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to" NSPS); *accord id.* § 7501(3) (for LAER). In certain circumstances, however, BACT and LAER can be more stringent than NSPS. *See id.* § 7479. Moreover, to obtain NNSR permits, sources must arrange for emissions reductions at other sources such that the modifications produce no increase in overall regional emissions. *Id.* § 7503. Sources must also demonstrate that any other sources owned by the same company comply with CAA requirements. *Id.* To obtain PSD permits, sources must undergo ambient air quality analyses to show that they will neither violate NAAQS increments nor adversely affect air quality in national parks or other areas that EPA has designated as needing particularly high-quality air. *Id.* § 7475.

Congress meant NSR to apply to both new *and modified* sources. Due to a technical defect, however, Congress initially achieved this goal only in the NNSR portion of the amendments, which defined modification by reference to the NSPS definition: "The terms 'modifications' and 'modified' mean the same as the term 'modification' as used in section 7411(a)(4) of this title." *Id.* § 7501(4). By contrast, the PSD portion of the amendments applied initially to new sources only. Congress corrected this in a technical amendment passed several months later, which applied the PSD program to sources that were to undergo modifications "as defined in section 7411(a) of this title." Pub.L. No. 95-190, § 14(a)(54), 91 Stat. 1393, 1402 (1977) (codified at 42 U.S.C. § 7479(2)(C)). As the legislative history

explains, this "technical and conforming" amendment "[i]mplements conference agreement to cover 'modification' ... [in] conform[ance with] usage in other parts of the Act." 123 CONG. REC. 36,250, 36,253 (Nov. 1, 1977).

In sum, the 1977 amendments carved out a significant difference between existing sources on the one hand and new or modified sources on the other. The former faced no NSR obligations--in the common phrase, they were "grandfathered"--while the latter were subject to strict standards. Limiting NSR to new or modified sources was one method of accomplishing the amendments' goal of "a proper balance between environmental controls and economic growth," *id.* at 27,076 (Aug. 04, 1977) (statement of Rep. Waxman) (quoted in *Chevron U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 852 n. 25, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

EPA promulgated an NSR regulation in 1978. (Although at this time and later ones, EPA issued multiple sets of regulations--those applying to PSD in states without approved SIPs, those applying to NNSR in states without approved SIPs, those applying to PSD in states with approved SIPs, and those applying to NNSR in states with approved SIPs--these sets are sufficiently similar that for simplicity we typically reference the first of these as a shorthand for them all.) The 1978 regulation defined a major "modification" as a "physical change, change in the method of operation of, or addition to a stationary source which increases the potential emission rate of any air pollutant regulated under the act." 43 Fed.Reg.

26,380, 26,403-04 (June 19, 1978). The phrase "potential emission rate," though new to EPA regulations relating to "modification," went unchallenged during ensuing litigation over other aspects of the 1978 regulation. That litigation culminated in this circuit's *Alabama Power Co. v. Costle* decision, issued initially as a brief opinion, 606 F.2d 1068 (D.C.Cir.1979), that was superceded six months later by a much longer one, 636 F.2d 323 (D.C.Cir.1979).

In the period between the two *Alabama Power* opinions, EPA proposed a new NSR regulation. The proposed definition of modification continued focusing on potential emissions rates rather than actual emissions. 44 Fed.Reg. 51,924, 51,952 (Sept. 5, 1979). After the issuance of the revised *Alabama Power* opinion, however, EPA changed its definition of modification. The final 1980 rule defined the term as follows: " '[m]ajor modification' means any physical change in or change in the method of operation of a major stationary source that would result in a *significant net emissions increase* of any pollutant subject to regulation under the Act." 45 Fed.Reg. 52,676, 52,735 (Aug. 7, 1980) (emphasis added). The regulation defined "[n]et emissions increase" as "any increase in actual emissions from a particular physical change or change in method of operation" that occurred after taking into account, through a process known as "netting," "any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable." *Id.* at 52,736. The regulation then defined "actual emissions" as follows:

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which proceeds the particular date and which is representative of normal source operation. The Administrator shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The Administrator may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

Id. at 52,737. In contrast to the proposed regulation's approach, this regulation emphasized "actual emissions." Justifying the shift, EPA explained in the regulation's preamble that while the initial *Alabama Power* decision had used the phrase "potential to emit," the later opinion used language that, "like the [statutory] definition, suggest[ed] changes in actual emissions," and that EPA had followed suit. *Id.* at 52,700. Finally, the 1980 regulation provided that "[a] physical change or change in the method of operation

shall not include ... an increase in the hours of operation or in the production rate." *Id.* at 52,735-36.

Several parties petitioned this court for review of the 1980 rule, but we stayed that challenge because of ongoing settlement discussions with EPA. Ultimately, EPA and the parties entered into an agreement providing that the agency would undertake a new rulemaking and that if the new rule failed to meet certain conditions, the parties could revive their stayed petitions.

In the proceedings before us today, industry petitioners and EPA dispute what the 1980 rule meant. Both agree that for a source to undertake a modification, it must first make a physical or operational change other than an increase in the hours of operation. They disagree over how to measure an "increase" in emitted pollutants once a change has occurred. According to industry petitioners, the 1980 regulation provided that an emissions "increase" occurs only if the maximum hourly emissions rate goes up as a result of the physical or operational change. According to EPA, however, an increase occurs under the 1980 regulations if, after netting, a source's past annual emissions (typically measured by averaging out the two "baseline" years prior to the change) are less than future annual emissions (measured by calculating the source's potential to emit after the change). EPA proffered this interpretation, which quickly became known as the "actual-to-potential" test, in proceedings leading up to *Puerto Rican Cement Co. v. EPA,* 889 F.2d 292 (1st Cir.1989), and *Wisconsin Electric Power Co. v. Reilly,* 893 F.2d 901 (7th

Cir.1990) ("*WEPCo* "). EPA also referred to this interpretation in its preambles to later rules, *see* 57 Fed.Reg. 32,314, 32,328 (July 21, 1992); 67 Fed.Reg. 80,186, 80,199 (Dec. 31, 2002).

Puerto Rican Cement 's facts illustrate the practical difference between industry's and EPA's interpretations. In that case, a factory sought to make a physical change: it would replace old cement kilns that operated 60% of the time with a new kiln that would emit fewer pollutants per hour. "If operated to achieve about the same level of production [as the old ones], the new kiln will pollute far less than the older kilns; but, if the Company operates the new kiln at significantly higher production levels, it will emit more pollutants than did the older kilns." 889 F.2d at 293. Under the actual-to-potential test, the company "increased" its emissions after the change, making it subject to NSR: operated at full potential, the new kiln would emit more pollutants than the old kilns had emitted when actually in operation. Under the interpretation urged by industry petitioners, however, the company had not undergone an "increase" in emissions--and thus would not trigger NSR-- since the new kiln would have a lower hourly emissions rate than the old ones. Siding with EPA, the First Circuit agreed that the company had to obtain an NSR permit to make the intended change. *Id.* at 296-99.

WEPCo, which is important because of EPA's response to it, addressed whether EPA could apply the actual-to-potential test to utility plants undergoing extensive renovations. The petitioner argued that given the particular nature of the utility market, it

was unfair to compare a utility's past actual emissions with its future potential emissions. Instead, the petitioner argued--and the Seventh Circuit agreed--that EPA should measure future emissions by projecting future actual emissions rather than by assuming, as it had done under the actual-to-potential test, that the source would operate at full capacity in the future. 893 F.2d at 916-18.

The Seventh Circuit decided *WEPCo* shortly before Congress enacted the 1990 amendments to the CAA. In those amendments, Congress added several programs– distinct from NSR--aimed at further securing good air quality through regulating existing sources. *See generally* Pub.L. No. 101-549, 104 Stat. 2399 (1990) (creating, among other things, programs aimed at reducing acid rain and at decreasing regional haze). Though it also made some changes related to NSR, Congress ultimately neither addressed the issues raised in *WEPCo, see* H.R. CONF. REP. NO. 101-952, at 344-45 (1990), nor revisited its statutory definition of modification, instead leaving it up to EPA to respond to that decision. EPA dealt with *WEPCo* by issuing a 1992 rule that changed the test utilities used for measuring emissions increases. 57 Fed.Reg. 32,314. Under the new test, known as the "actual-to-projected-actual test," utilities would determine whether they had post-change increases in emissions--and thus whether they needed NSR permits--by comparing actual emissions before the change to their projections of actual post-change emissions. *See id.* at 32,323-26. In measuring projected emissions, EPA permitted utilities to exclude increases stemming from unrelated demand growth, reasoning that such increases would

in no way be caused by physical or operational changes. *See id.* at 32,326-28. The parties call this the "demand growth exclusion." Applying the actual-to-projected-actual test and the demand growth exclusion to utilities only, EPA left the actual-to-potential test in place for other sources.

NY v. US EPA, 413 F.3d 3, 11 -16.

Noteworthy for the discussion here are two points from *NY v. US EPA*: first, neither the (utility)industry nor EPA ever sought, nor was the D.C. Circuit called upon to issue, a definitive decision on the 1980 rule and the controversy over the conflicting arguments over what constituted a (major) modification so as to trigger application of NSR and NSPS. So far as the court can tell, industry and EPA peacefully co-existed to that limited degree. Second, the D.C. Circuit, when it had an opportunity to do so, expressly declined to express an opinion

> " as to whether Congress intended to require that EPA use identical regulatory definitions of modification across the NSPS and NSR programs. *Cf. United States v. Duke Energy*, No. 04-1763, slip. op. at 11-19."[9]

413 F. 3d 3, 20.

The lack of a decision from the D.C. Circuit on the 1980 rule is significant if for no other reason than

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[9] Now 411 F.3d 539, 542 - 51 (4th Cir. 2005).

that it has exclusive subject matter jurisdiction to determine the validity of EPA regulations with nationwide applicability, 42 U.S.C. §7607(b), and it could have, but didn't, reach the Fourth Circuit's interpretation of "modification"in *Duke Energy, supra.*[10] So, while the D.C. Circuit's pronouncement(s) on the 2003 EPA NSR rule are binding on this court, its ruling in *NY v. US EPA, supra,* did not dispose of the issues addressed here. Lacking controlling precedent, the court is inclined to follow the most recent appellate interpretation of those rules as they apply to thedefinition of "modification", *U.S. v. Duke Energy, supra,* which held that the same definition applies to NSPS and NSR programs. In *U.S. v. Alabama Power, supra,* this court noted that the emissions question has been answered differently by different courts, and ultimately adopted the *Duke Energy*'s District Court definition.[11]

III. TVA's COLBERT UNIT 5

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[10] The *NY v. EPA* court declined to do so on the grounds of procedural default, the issue not having been raised in the opening brief. *Id.* And, while the 1980 rule is no longer applicable except in cases, such as this one, that remain in litigation over the meaning of modification under the 1980 rule, and what test is used to monitor emissions increases under the 1980 rule, *see U.S. v. Alabama Power,* 372 F.Supp. 2d 1283 (N.D. Ala. 2005), the D.C. Circuit may not have wished to express, even in *dicta,* its views.

[11] The Fourth Circuit found it unnecessary to reach the emissions question in *Duke Energy.*

There is no dispute that Unit 5 of the Colbert plant was built before enactment of the new source provisions of the 1970 and 1977 CAA amendments, and falls under new source rules only if the unit underwent a "major modification." As already noted, NPCA says, and TVA denies, that the work done at Colbert Unit 5 in the early 1980s was a "major modification" that converted Colbert Unit 5 into a "new source."[12]

IV. STANDARD OF REVIEW

Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

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[12] Newspaper articles submitted in support of its Motion quote TVA as saying the Colbert plant was poorly designed, out of service one-third (a) of the time, and the 1982 work was a "rehabilitation". Ex.'s 16, 17. The articles are submitted, together with Federal Register notices about the work and related bid documents, to show that ADEM, NPCA, and the rest of the world knew about the scope of the work The inference asked to be drawn is that TVA actions in proceeding with the work without (NSR, NNSR, or PDS) permit(s) was legal because everyone knew and no one said or did anything. This argument, if it ever had any persuasive weight, died on November 22, 2005 when the Court of Appeals trampled a similar argument used to defend the 2% de minimis rule. *Sierra Club v. TVA supra.* Actually the *Sierra Club* argument was stronger, because ADEM had adopted the 2% de minimis rule and, as TVA's "friend", defended it in an *amicus curiae* filing with the Court of Appeals. A lack of enforcement does not make legal what is illegal. 42 U.S.C. §110(a). If there was ever any doubt before, in this Circuit it's now clear that it is better to ask permission than forgiveness.

no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000). The party asking for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings or filings which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party has met its burden, Rule 56(e) requires the non-moving party to go beyond the pleadings and, by its own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324.

The substantive law will identify which facts are material and which are irrelevant. *Chapman*, 229 F.3d at 1023; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the non-movant. *Chapman*, 229 F.3d at 1023; *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248; Chapman, 229 F.3d at 1023. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249.

The method used by the party moving for summary judgment to discharge its initial burden

depends on whether that party bears the burden of proof on the issue at trial. See *Fitzpatrick*, 2 F.3d at 1115-17 (citing *U.S. v. Four Parcels of Real Property*, 941 F.2d 1428 (11th Cir. 1991)(*en banc*)). If the moving party bears the burden of proof at trial, then it can only meet its initial burden on summary judgment by coming forward with positive evidence demonstrating the absence of a genuine issue of material fact; i.e. facts that would entitle it to a directed verdict if not controverted at trial. *Fitzpatrick*, 2 F.3d at 1115. Once the moving party makes such a showing, the burden shifts to the non-moving party to produce significant, probative evidence demonstrating a genuine issue for trial.

If the moving party does not bear the burden of proof at trial, it can satisfy its initial burden on summary judgment in either of two ways. First, the moving party may produce affirmative evidence negating a material fact, thus demonstrating that the nonmoving party will be unable to prove its case at trial. Once the moving party satisfies its burden using this method, the non-moving party must respond with positive evidence sufficient to resist a motion for directed verdict at trial.

The second method by which the moving party who does not bear the burden of proof at trial can satisfy its initial burden on summary judgment is to affirmatively show the absence of any evidence in the record in support of a judgment for the nonmoving party on the issue in question. This method requires more than a simple statement that the non-moving party cannot meet its burden at trial but does not

require evidence negating the non-movant's claim; it simply requires the movant to point out to the court that there is an absence of evidence to support the non-moving party's case. *Fitzpatrick*, 2 F.3d at 1115-16. If the movant meets its initial burden by using this second method, the non-moving party may either point to evidence in the court record, overlooked or ignored by the movant, sufficient to withstand a directed verdict, or the non-moving party may come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency. However, when responding, the non-movant can no longer rest on mere allegations, but must set forth evidence of specific facts. *Lewis v. Casey*, 518 U.S. 343 (1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

V. The Disputed Issues

The parties' disputes surrounding the statute of limitations defense are, with some overlap, as follows:

1. Whether the work was a discrete construction project or a combined construction/operating project, and, in either case, whether a permit should have been issued that required BACT or LAER.

2. Whether the statute of limitations applies to NPCA's claim for injunctive relief and bars such relief pursuant to the concurrent remedy doctrine;

3. Whether the NPCA's claims under the Alabama State Implementation Plan ("SIP"), which requires Best Available Control Technology ("BACT"), are not barred by the statute; and

4. Whether laches applies to NPCA's claims.

VI. Discussion

1. Whether the work was a discrete construction project or a combined construction/operating project, and, in either case, whether a permit should have been issued that required BACT or LAER.

3. Whether the NPCA's claims under the Alabama State Implementation Plan ("SIP"), which requires Best Available Control Technology ("BACT"), are not barred by the statute of limitations.

Because the court 's decision on NPCA's first argument also applies to the NPCA's third argument, it will discuss them together.

Under the statute of limitations, a claim "first accrues" on the date that a violation first occurs. *3M Co. v. Browner*, 17 F.3d 1453, 1462 (D.C. Cir. 1994). However, where a violation is ongoing, the statute of limitations is tolled for as long as the violation continues (the "continuing violations" doctrine). *Haven Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982).

The majority of courts that have decided whether preconstruction permitting violations constitute "continuing violations" for statute of limitation purposes have said they do not. That is, "preconstruction permit violations occur *only* at the time of the construction or modification of the emitting facility." *United States v. Westvaco Corp.*, 144 F. Supp. 2d at 443 (emphasis supplied).

In *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650 (W.D.N.Y. 2003), the State of New York sued several utilities contending that life extension projects on their aging plants were "major modifications" that violated the law because the defendants had not first obtained PSD permits and installed BACT.[13] Many of the projects occurred more than five years before the lawsuit was filed. The state argued that the violations of the permitting requirements "constitute an ongoing and continuing violation." *Id.* at 660. The *Mohawk* court disagreed:

> A given construction or modification project occurs only once. If a permit is not obtained for that particular project, then the preconstruction permit requirement of the Clean Air Act has been violated. However, the requirement to secure a preconstruction permit applies *prior* to construction or modification. Once the construction or modification is complete, the window in which to apply for and obtain a

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[13] The 1982 work at Colbert 5 was, at least, a life extension project. *Compare* fn. 12, *supra*.

> preconstruction permit is gone. Thus, a violation of the Clean Air Act's preconstruction permit requirement is singular in nature, and does not constitute an ongoing violation.

Id. at 661 (emphasis in original); *see also id.* at 665 (holding that violation of obligation to install BACT is not a continuing violation).

TVA says, and the court agrees, that the failure to obtain a required preconstruction permit at Colbert 5 in 1982 or 1983 (when the work was completed, Gore Affidavit, Exhibit 7) was not a continuing violation, i.e. one that continues to the time suit was filed, and to this day. To rule otherwise would be to say that construction work never ends. The court says it must "distinguish[] between the present consequences of a one-time violation, which does not extend the limitation period, and a continuation of a violation into the present, which does." *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 658 (11th Cir. 1993); *see also Tolbert v. Ohio Dep't of Transp.*, 172 F.3d 934, 940 (6th Cir. 1999) ("'[A] continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation.'") (*quoting Nat'l Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991)).

In addition to *Westvaco* and *Niagra Mohawk*, *supra*, other courts following the majority rule include *United States v. Ill. Power Co.*, 245 F. Supp. 2d at 957 (rejecting continuing violation doctrine--"these provisions cannot reasonably be construed to mean that building or altering a machine without a permit is a violation that continues as long as the machine

exists or is operated"); *United States v. S. Ind. Gas & Elec. Co.*, 2002 WL 1760752, at *5 (concluding that violation "does not continue on past the date when construction is completed") (Ex. 27); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d at 1084 (holding that statute of limitations "begins to run at the time of construction and does not continue through the operational life of the modified source"); *United States v. Coastal Lumber Co.*, Case No. 4:01-cv238-SPM (N.D. Fla. Dec. 23, 2001) (rejecting continuing violation doctrine) (Ex. 28); *United States v. Brotech Corp.*, No. Civ. A. 00-2428, 2000 WL 1368023, at *2 (E.D. Pa. Sept. 19, 2000) (rejecting continuing violation argument) (Ex. 29); *United States v. Campbell Soup Co.*, No. CIV-S-95-1854 DFL, 1997 WL 258894, at *2 (E.D. Cal. 1997) ("[T]he regulation cannot reasonably be construed to mean that building or altering a machine without a permit is a violation that continues as long as the machine still exists or is operated.") (Ex. 30); *see also Satterfield v. J.M. Huber Corp.*, 888 F. Supp. 1561, 1564 (N.D. Ga. 1994) (rejecting continuing violation argument for purposes of CAA § 304(a)'s jurisdictional requirement: "The gravamen of Count I is that defendant failed to undergo the required review to receive a proper [PSD] permit. A defendant can only fail to obtain a permit once. This alleged violation is incapable of repetition because the plant's construction was completed years before the present suit was brought."). TVA Ex. 7, Gore Decl., establishes that, at the time of the 1982 work at Colbert 5, Alabama had a construction permit program and not a combined construction /operating permit program. Assuming the 1982 work *did* trigger provisions of the PSD or NNSR programs, TVA was required to obtain a construction

permit before commencing construction. NPCA's assertion that TVA had to obtain, either in 1982 or in 1985 when the Alabama ADEM emissions permitting process was changed, a "PSD operating permit" or an "NNSR operating permit," is rejected.[14]

NPCA urges the court to follow, as it did in *U.S. v. Alabama Power, supra,* the reasoning of *U.S. v. Duke Energy,* 278 F.Supp. 2d 619, 651 (M.D.N.C, 2005), on the continuing violation analysis. In *Duke Energy* (in a part of the ruling not considered or adopted by this court in *Alabama Power),* the court held that Duke Energy's operations did constitute a continuing violation. While it is true that the *Duke Energy* district court expressed doubt about the majority rule, the court did not say why it had such reservations. Second, and much more important, Duke Energy's permits from North and South Carolina both contained **combined** construction / operation language. 278 F.Supp. 2d at 651 - 52. If NPCA had materially disputed the Gore Declaration that, when the 1982 work was undertaken, Alabama's construction permit had an ongoing operating permit that TVA violated before, during, and subsequent to the 1982 work, then the reasoning of *Marine Shale* and *Duke Energy* (district court) would apply, and the result could well be different.[15] NPCA has not done so.

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[14] As noted above, the work was completed in 1983.

[15] This difference distinguishes the (non-binding) decision of the Fifth Circuit, *United States v. Marine Shale Processors,* 81 F.3d 1329 (5th Cir. 1996) (operating a facility without a

Accordingly, NPCA's (First and Second Cause of Action) PSD and NNSR claims are time-barred, as to all claims relating to the 1982 and 1983 construction work at Colbert 5 because the cause of action accrued either in 1982 when the preconstruction permit obligation was allegedly violated, or alternatively in 1983 when the work was completed. In neither case did NPCA commence this action within five (5) years.

The above reasoning, and result, does not obtain with respect to TVA's **operation** of Colbert 5. While NPCA ties the illegality of Colbert 5's operation to permitting failures, *Sierra Club v. TVA*, F.3d , Slip Opinion No. 04-15324, 2005 WL 3110516 (11th Cir., November 22, 2005) says that the entire Colbert County TVA plant, which includes Colbert 5, is in violation of the Act for failure to meet the 20% opacity requirement of the Act and the SIP.

In *Sierra Club v. TVA*, the Court of Appeals rejected ADEM's 2% de minimis rule as an end around the Act, and specifically the 20% opacity limitation contained in Alabama's EPA-approved SIP. The Court stated that ADEM's 2% de minimis rule was not entitled to *Chevron*[16] deference because the 2% rule

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required preconstruction permit is a continuing ongoing violation of the Act; Louisiana SIP required minor source permits be obtained prior to construction and required that the permit include subsequent operational restrictions on air emissions). 81 F.3d at 1355 -56.

[16] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984), the leading

violated the Act and so could not be a reasonable interpretation of, or regulation issued under, the Act. The Court pointedly noted that the 2% de minimis rule had not been submitted to EPA when it was first placed in use, had not been approved by EPA when ADEM, responding to Sierra Club's threat of litigation, did submit it, and, years later at the time of its opinion, still had not been approved.

Further, the Court rejected out of hand TVA's arguments, joined in by "its friend" Alabama that, because the use of COMS permitted stricter emissions monitoring than Method 9 (which in practice provided for almost no emissions monitoring), TVA needed the safe harbor provided by the 2% de minimis rule, or that, in the alternative, the 2% de minimis rule was a reasonable interpretation of the "credible evidence rule".[17] The fact that industries might get away with more pollution than permitted by the 20% opacity limitation because of ineffective enforcement was inconsequential to the Court, nor did it find any

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case on deference paid by courts to federal and state administrative agency interpretations of the statutes administered under their jurisdiction.

[17] "Notwithstanding any other provision in [the ADEM regulations], any credible evidence or information relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test had been performed, can be used to establish whether or not an owner or operator has violated or is in violation of any rule or standard in this Division." Ala. Admin. Code r. 335-3-1-.13(2).

support for the argument that when EPA approved Alabama's SIP adoption of the "credible evidence" rule, EPA intended to modify "implicitly and downward the 20% opacity limitation". (Slip Op. at 24) The Court said the Act provides for continuous compliance, 42 U.S.C. § 7602(k), and Alabama's "interpretation" of its SIP could not change the Act's mandate of continuous compliance.[18] (Slip Op. at 24)

To this court, after *Sierra Club v. TVA*, the NPCA arguments about why Colbert 5 is in violation of the Act are moot. The Court of Appeals has said the entire plant is in violation of the Act, and remanded the action to this court for appropriate proceedings, which this court says includes declaratory and injunctive relief, and the award of attorney's fees to the plaintiffs. Unless and until the Eleventh Circuit's ruling in *Sierra Club v. TVA* is modified, withdrawn, or overturned, this court does not have to reach NPCA's SIP operating permit arguments. Colbert 5, like the rest of the TVA Colbert County plant, violates the Act every time a COMS reading exceeds twenty percent (20%) opacity, unless the reading falls into one of the four (4) exclusions.[19]

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[18] The court said "By using an informal, non-public, undocumented 'interpretation' method of revising the SIP before 2003, ADEM short-circuited the important protections against uninformed and arbitrary rulemaking, and it attempted to avoid entirely EPA oversight of the SIP process". Slip Opinion at 26.

[19] "At the time this lawsuit was filed, the Colbert plant was operating under permits ADEM had issued in March 1998. One of the requirements of the Colbert plant's air permits is that TVA install, maintain, and operate a continuous opacity monitoring

2. Whether the statute of limitations applies to NPCA's claim for injunctive relief and bars such relief pursuant to the concurrent remedy doctrine;

The source of the "concurrent remedy" rule is *Cope v. Anderson*, 331 U.S. 461, 464; 67 S. Ct. 1340, 1341, 91 L. Ed. 1602, 1607 (1947). Basically, the concurrent remedy doctrine says that where a party's legal remedies are time barred, that party may not circumvent the bar by asserting equitable remedies. The Eleventh Circuit affirmed Judge Johnson's Order, entered February 20, 2003, that TVA, as an agency of the United States, is entitled to sovereign immunity from civil penalties, *Sierra Club v. TVA, supra.* TVA is immune from civil penalties, and the question becomes whether NPCA can obtain injunctive relief or whether that relief is barred as a concurrent remedy. The court says NPCA can do so: the Eleventh Circuit's ruling in *Sierra Club v. TVA, supra*, reversed this court's grant of summary judgment in favor of TVA "on the remaining claims for declaratory and injunctive relief", and remanded for proceedings consistent with its opinion.

The court anticipates TVA will says the Eleventh Circuit's ruling doesn't end the inquiry because *Sierra Club v. TVA* did not reach the concurrent remedy question. There, civil penalties

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system ("COMS") in each of the plant's smokestacks. See Ala. Admin. Code r. 335-3-12-.02(3). As its name indicates, COMS is a device that monitors continuously the opacity of a plume of smoke." *Sierra Club v. TVA, supra*, Slip Opinion at 5.

were barred under the doctrine of sovereign immunity, not the running of the statute of limitations.[20] And there is authority that it remains the law of this Circuit that where legal and equitable relief are sought, and the legal relief is barred by the running of the statute of limitations, the concurrent remedy doctrine will be applied to bar the equitable relief as well. *United Transp. Union v. Fla. East Coast Ry. Co.*, 586 F.2d 520, 523-24 (5th Cir. 1978).[21]

NPCA cites *U.S. v. Banks*, 115 F.3d 916 (11th Cir. 1997) as support for the inapplicability of the concurrent remedy. *Banks* said so, but only as against the United States acting in its sovereign capacity. *Id.* at 319. Citizen suits are not the same. Congress enacted the citizen suit provision of the CAA to authorize citizens to act as "private attorneys general", *see Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 17, 101 S.Ct. 2615, 2624 (1980). 42 U.S.C. § 7604, the citizen suit provisions, authorizes suit by a citizen "on his own behalf". "On his own behalf" establishes that a citizen plaintiff, while a "private attorney general,"

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[20] The doctrine does not bar enforcement a 20 ctions brought by the United States in its sovereign capacity. *E.I. Dupont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924); *United States v. Alvarado*, 5 F.3d 1425, 1425 (11th Cir. 1993).

[21] In *Bonner v. City of Prichard*, 661 F.2d 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions rendered by the former Fifth Circuit prior to October 1, 1981.

nevertheless does not, merely by virtue of filing suit under the statute in question, represent the public at large in the same sense that a state attorney general or the Department of Justice does when it brings an enforcement action. *See Natural Resources Defense Council v. Train*, 510 F.2d 692, 723-30 (D.C. Cir. 1974).

As an alternative argument, NPCA, in a recent filing (doc. 207), cites language in the November 5, 2005, Order entered by the United States District Court for the Southern Division of Indiana, *United States v. Cinergy Corp.*, 99-1693-LJM-VSS (document 647) ("*Cinergy*") for the proposition that civil fines and equitable remedies are not concurrent because they have "different goals and effects". *Cinergy* Order at p.10.[22]

The court is not persuaded. First, as TVA notes, the language is *dicta*, because the United States is a party in *Cinergy*. Second, the court does not know what "different goals and effects" means, and thinks adopting that standard would permit a court to reach the result desired by reference to the required "goals and effects". By contrast, the distinction between "legal" and "equitable" remedies is long standing and there is widespread agreement on the basic distinction, *i.e.* that a plaintiff's claims that can be satisfied by an award of money damages are "legal" and claims that cannot be satisfied

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[22] In that same opinion, at pages 6 - 7, the *Cinergy* court dismissed as time barred a number of construction projects, rejecting the "continuing violation" doctrine.

by such an award, or which call for non-monetary relief, are "equitable". Adding to the appeal of maintaining this distinction is the ability to "borrow" from case law in other statutes, e.g. ERISA, where the "legal" vs. "equitable" analysis is used, *i.e., Mertens v. Hewitt*, 113 S.Ct. 2063, 508 U.S. 248, 12 L.Ed.2d 161 (1993) (ERISA plan seeks to recover from nonfiduciaries participating in fiduciary's breaches; action is not "appropriate equitable relief" and statute does not authorize suits for money damages), and *Great-West Life v. Knudson*, 122 S.Ct. 708, 534 U.S. 204, 151 L.Ed.2d 615 (2002). (ERISA plan seeks to recover from third parties benefits paid by the plan(s) to plan members/plan beneficiaries; courts are required to decide whether, under the facts presented, the claim is for the equitable remedy of restitution (recovery allowed) or for "legal" money damages (claim disallowed)). This court can't find authority or guidance in the CAA for a logical application of the "different goals and effects" analysis of "legal" versus "equitable" claims, and declines to follow *Cinergy*.

Having said all that, this is an issue that, post-*Sierra Club v. TVA*, is probably going to be found irrelevant. Assuming the mandate issues in accordance with the Court's opinion, *Sierra Club v. TVA* will involve injunctive relief, and since that relief will be plant-wide, it will necessarily include Colbert 5.

4. Whether laches applies to NPCA's claims

In light of *Sierra Club v. TVA, supra*, and the treatment of the statute of limitations herein, the

court finds it unnecessary to reach the issue of laches. While laches may arise as a defense to NPCA's Third Cause of Action[23], that claim is not before the court in this motion.

VII. Consolidation Of This Action With *SIERRA CLUB v. TVA*

Sierra Club v. TVA, supra, involves two (2) of the three (3) parties in this action, Sierra Club and TVA. This action involves Unit No. 5 of TVA's Colbert County plant; *Sierra Club v. TVA* involves the entire plant. Both actions are assigned to this Judge. Both actions seeks declaratory and injunctive relief, and in neither case will the Plaintiffs be able to recover civil penalties against TVA. In this action, NPCA alleges TVA's failure to install COMS in Colbert 5 violates the Clean Air Act; *Sierra Club v. TVA* says

> TVA's ADEM-issued air permits reflect these regulatory requirements: TVA must install COMS to measure opacity and include "average and maximum excess emissions over 20%

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[23] NPCA's Third Cause of Action, ¶¶ 1 - 91, "The NSPS Violations", says that the work at Colbert 5 constituted a "modification" as defined in 42 U.S.C. § 7411(a)(2), transforming Colbert 5 to a "new source" of emissions subject to the New Source Performance Standards ("NSPS"). NPCA says Colbert 5 has failed to meet the applicable NSPS notification, performance testing, monitoring and reporting requirements, and continues to operate in violation thereof, including *inter alia*, the failure to install a Continuous Monitoring System ("COMS") for Colbert 5 as required by 40 C.F.R. Part 60, Appendix B, 40 C.F.R. §§ 60.13 and 60.47.

> [opacity] computed from six-minute averages" in quarterly reports to ADEM. ADEM Permit No. 701-0010- Z009 at 3.

Slip Opinion, fnote 4 at pp. 24 - 25. In short, this action and *Sierra Club v. TVA* have substantial identity of claims and remedies, and the court will, when the mandate is received, consolidate *Sierra Club v. TVA* with this action.

For the reasons stated, TVA's Motion For Partial Summary Judgment on the First and Second Causes of Action based on the running of the Statute of Limitations will be construed as a motion for summary judgment on the grounds of sovereign immunity and the running of the statute of limitations, and, construed as such, **GRANTED** in part and **DENIED** in part.

A separate Order will issue.

Done on November 29th, 2005.

s/ VIRGINIA EMERSON HOPKINS
United States District Judge

NATIONAL PARKS CONSERVATION ASSOCIATION'S 60-DAY NOTICE LETTER

October 30, 2000

BY CERTIFIED MAIL: RETURN RECEIPT REQUESTED

Chairman Craven Crowell
Tennessee Valley Authority
Corporate Headquarters
400 W. Summit Hill Dr.
Knoxville, TN 37902-1499

Manager
TVA John Sevier Fossil Plant
Hwy 70 S
PO Box 2000
Rogersville, TN 37857-1900

Manager
TVA Johnsonville Fossil Plant
Hwy 70
PO Box 259
New Johnsonville, TN 37134-0259

Manager
TVA Colbert Fossil Plant
900 Steam Plant Rd
Tuscumbia AL 35674-6906Manager
TVA Widows Creek Fossil Plant
Steamplant Rd Off Hwy 72
PO Box 2000
Stevenson AL 35772-2000

Manager
TVA Bull Run Fossil Plant
1265 Edgemoor Rd

Clinton TN 37716-6270

Manager

TVA Paradise Fossil Plant
13246 State Route 176
Suite 10
Drakesboro, KY 42337-2345

Manager
TVA Shawnee Fossil Plant
7900 Metropolis Lake Rd
West Paducah KY 42086-9414

Manager
TVA Allen Fossil Plant
2574 Plant Road
Memphis, Tennessee 38109-3014

Manager
TVA Cumberland Fossil Plant
815 Cumberland City Rd
PO Box 2000
Cumberland City TN 37050-2000

Manager
TVA Kingston Fossil Plant
Swan Pond Rd
PO Box 2000
Kingston TN 37763-2000

RE:Notice of Intent to Sue for Violations of the Clean Air Act at the Allen, Bull Run, Cumberland, Kingston, John Sevier, Paradise, Shawnee, Colbert, Widows Creek, and Johnsonville Fossil Plants.

Dear TVA:

We are writing on behalf of the National Parks Conservation Association (NPCA) to notify you of its intent to file suit on behalf of itself and its members for significant and ongoing violations of the Clean Air Act at many of your coal-fired power plants in Tennessee, Alabama and Kentucky. For years these coal-fired power plants together have been illegally emitting, on an annual basis, at least 90,000 tons of sulfur dioxide and 180,000 tons of nitrogen oxides.

The Clean Air Act violations that are the subject of this letter have been occurring and continue to occur at the Allen Fossil Plant in Shelby County, Memphis, Tennessee; the Cumberland Fossil Plant in Stewart County, Cumberland City, Tennessee; the Bull Run Fossil Plant in Anderson County, Clinton, Tennessee; the John Sevier Fossil Plant in Hawkins County, Rogersville, Tennessee; the Kingston Fossil Plant in Roane County, Kingston, Tennessee; the Johnsonville Fossil Plant in New Johnsonville, Humphreys County, Tennessee; the Paradise Fossil Plant in Muhlenburg County, Drakesboro, Kentucky; the Shawnee Fossil Plant in McCraken County, Paducah, Kentucky; the Colbert Fossil Plant in Colbert County, Tuscumbia, Alabama; and the Widows Creek Fossil Plant in Jackson County, Stevenson, Alabama;

Pursuant to the Clean Air Act, 42 U.S.C. §§7604(a)(1), citizens are entitled to bring suit to enjoin violations of an emission standard or limitation, and to seek civil penalties for such violations. Citizens are also entitled to bring suit against any person who has modified a major emitting facility without first obtaining a PSD permit required under Part C or an NSR permit under Part D of Subchapter I of the Act,

and to seek penalties for those violations as well. See Clean Air Act §§ 304(a)(3), 42 U.S.C §§7604(a)(3). The Clean Air Act provides for civil penalties of up to $27,500 for each violation per day. To the extent required by Section 304(a)(1) of the Clean Air Act, we therefore are writing to notify you that unless this matter is otherwise fully resolved, we intend to file suit in the applicable federal district courts anytime 60 days after the postmark date of this letter to enjoin and penalize the violations described below.1

I. PSD/NSR VIOLATIONS

A. Background

Pursuant to the Clean Air Act, EPA has issued national ambient air quality standards ("NAAQS") for six "criteria" air pollutants, including nitrogen dioxide ("NO2"), sulfur dioxide
("SO2"), and particulate matter ("PM"). See 42 U.S.C. §§ 7409; 40 C.F.R. §§50.1 et seq.. The Act also requires each state to classify areas within its boundaries based on whether the air quality in these areas meets these standards. An area which meets the national ambient air quality standards for a particular criteria pollutant is considered an "attainment" area for that pollutant. An area that does not meet the national ambient air quality standard for a pollutant is considered a "nonattainment" area for that pollutant. Areas for which insufficient information is available to determine whether the NAAQS are being met are termed "unclassifiable."

The purpose of Part C of the Clean Air Act (42 U.S.C. §§§§7470-7492) is to prevent any significant deterioration of air quality in areas designated as in attainment or unclassified. This purpose is achieved by

requiring a Prevention of Significant Deterioration ("PSD") permit before any new major source of air pollutants is constructed, and before any existing source makes a "major modification" that will cause an increase in emissions of air pollutants. A major modification is defined in the PSD regulations as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 40 C.F.R. §§§§51.166(b)(2)(i) and 52.21(b)(2)(i). A "significant" net emissions increase of sulfur dioxide (SO2) or nitrogen oxides (NOx) is defined in the PSD regulations as 40 tons or more per year; a "significant" net emissions increase of particulate matter is 25 tons or more per year. 40 C.F.R. §§§§51.166(b)(23)(i) and 52.21(b)(23)(i). Before a PSD permit may be issued authorizing a significant increase in emissions from an existing source, the permit must require the installation and operation of best available control technology ("BACT") for reducing emissions. Further, before a PSD permit may be issued the polluter proposing the modification must demonstrate that any increase in emissions, after the installation and operation of BACT, will not adversely impact human health or welfare or any Class I areas such as the Great Smoky Mountains and Shenandoah National Parks.

All of your coal-fired power plants identified below are existing sources of air pollution at which you have undertaken major modifications without first obtaining PSD permits and thereafter installing and operating BACT.

Furthermore, some of the plants identified

above are located in areas that are not attaining the NAAQS. Before making major modifications to those plants, Part D of the Clean Air Act (42 U.S.C. §§7501-7515) required you to comply with the permitting requirements that apply in nonattainment areas. These requirements, often referred to as the "nonattainment NSR" program, are designed to ensure a net reduction in the emission of air pollutants in areas that have not attained the NAAQS so that the air quality in these areas improves. To obtain a nonattainment NSR permit, the proponent of a new or modified source must install air pollution controls that meet the "lowest achievable emission rate" ("LAER"), must obtain federally enforceable emission offsets at least as great as the new or modified source@s emissions, must certify that all other major sources that it owns or operates within the state are in compliance with the CAA, and must demonstrate that the benefits of the proposed modification significantly outweigh the environmental and social costs imposed as a result of its construction or modification. As we set out below, you have also violated the Clean Air Act by making major modifications at coal-fired power plants you operate without obtaining the required nonattainment NSR permits.

Finally, the Clean Air Act requires that if you make any modifications to your plants that are not considered "major," you are still required to obtain a general or "minor" new source review ("NSR") permit regardless of the plant"s location. You have also violated this requirement on numerous occasions.

Congress has provided states with the opportunity to implement certain requirements of the Clean Air Act through federally enforceable

regulations known as State Implementation Plans ("SIPs"). The SIPs for Tennessee, Kentucky, and Alabama, the states in which you operate your coal-fired power plants, all contain, in whole or in part, the PSD and nonattainment NSR requirements discussed above. To the extent these states have not adopted these requirements, their SIPs are supplemented by the federal regulations described above.

B. The Violations

Each of the violations discussed below began on the day you commenced construction of the modification and will continue every day until you obtain the appropriate PSD/NSR permit and operate the necessary pollution control equipment to satisfy the SIP requirements.

1. Allen Unit 3

Since 1992 you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications to your Allen Unit 3 power plant. In particular, you made "major modifications" to this facility as that term is defined by the Tennessee SIP, Tennessee Air Pollution Control Regulation and Memphis-Shelby Air Pollution Control Regulation, Article I, Division IV, 16-77, S1200-3-9-.01(4)(b)(2), through a significant overhaul of this unit in 1992 that included, but is not limited to, replacement of the horizontal reheater with a redesigned reheater. To complete this project, you built a railroad track from the platform into the building for the movement of reheater elements. You also reinforced the building"s structural steel in order to support the additional weight. You also constructed a monorail system inside the boiler to move reheater elements in and out, and

built a trolley for the railroad track to run between the boiler and an outside platform. These changes created the potential for, and/or resulted in a significant net emissions increase of SO2, and NOx. You performed such work without first obtaining a PSD permit. Further, since 1992 you have operated this unit without a PSD permit.

Accordingly, you violated and remain in violation of Tennessee Air Pollution Control Regulation and Memphis-Shelby Air Pollution Control Regulation, Article I, Division IV, 16-77, S1200-3-9-.01(4) by making these modifications without first obtaining a PSD permit, without first installing BACT, without first meeting other PSD program requirements that are in the Tennessee SIP, and by continuing to operate this unit without complying with such requirements. Further, you violated and remain in violation of Tennessee Air Pollution Control Regulation and Memphis-Shelby Air Pollution Control Regulation, Article I, Division IV, 16-77, S1200-3-9-.01(1) by making these modifications without first obtaining a minor NSR permit.

2. Bull Run

Since 1988 you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications to your single unit at Bull Run. In particular you made "major modifications" to this facility, as that term is defined by the Tennessee SIP, Tennessee Air Pollution Control Regulation 1200-3-9-.01(4)(b)(2), through a significant overhaul of this unit in 1988 that included, but is not limited to, replacement of the secondary superheater outlet pendant elements and replacement of all economizer elements in the "A" and "B" furnace. This project led

you to replace more than 58,000 feet of tubing in the boiler, about 26.5% of the total tubing in the boiler. These changes created the potential for, and/or resulted in a significant net emissions increase of SO2, NOx, and particulate matter. You performed such work without first obtaining a PSD permit. Further, since 1988 you have operated this unit without a PSD permit.

Accordingly, you violated and remain in violation of Tennessee Air Pollution Control Regulation 1200-3-9-.01(4) by making these modifications to Bull Run without first obtaining a PSD permit, without first installing BACT, without first meeting other PSD program requirements that are in the Tennessee SIP, and by continuing to operate this unit without complying with such requirements. Further, you violated and remain in violation of Tennessee Air Pollution Control Regulation 1200-3-9-.01(1) by making these modifications without first obtaining a minor NSR permit.

3. Cumberland Units 1 and 2

Since 1996, you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications to your Cumberland Units 1 and 2. In particular, you made "major modifications," as that term is defined by the Tennessee SIP, Tennessee Air Pollution Control Regulation 1200-3-9-.01(4)(b)(2), to Cumberland Unit 1 in 1996 and Cumberland Unit 2 in 1994 through a significant overhaul of these units that included, but is not limited to, the replacement and redesign of their respective secondary superheater outlet headers, replacement of their secondary superheater pendant elements and replacement of their lower waterwalls.

These changes created the potential for, and/or resulted in a significant net emissions increase of SO2, NOx and particulate matter. You performed such work without first obtaining PSD permits. Further, since 1988 you have operated these units without PSD permits.

Accordingly, you violated and remain in violation of Tennessee Air Pollution Control Regulation 1200-3-9-.01(4) by making these modifications to Cumberland Units 1 and 2 without first obtaining PSD permits, without first installing BACT, without first meeting other PSD program requirements that are in the Tennessee SIP, and by continuing to operate these units without complying with such requirements. Further, you violated and remain in violation of Tennessee Air Pollution Control Regulation 1200-3-9-.01(1) by making these modifications without first obtaining minor NSR permits.

4. Kingston Units 6 and 8

Since 1990, you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications at Kingston Units 6 and 8. In particular, you made "major modifications," as that term is defined by the Tennessee SIP, Tennessee Air Pollution Control Regulation 1200-3-9-.01(4)(b)(2), to Kingston Unit 6 in 1989-90 and Kingston Unit 8 in 1990 through a significant overhaul of these units that included, but is not limited to, the replacement of all superheater crossover tubes, lower horizontal and side waterwall tubes of the superheat and reheat furnace and the replacement of all superheater intermediate pendant elements and all reheater intermediate pendant elements. These changes created the potential

for, and/or resulted in a significant net emissions increase of SO2 and NOx at both units. These changes also created the potential for, and/or resulted in a significant net emissions increase of particulate matter at Unit 8. You performed such work without first obtaining PSD permits. Further, since 1990 you have operated these units without PSD permits.

Accordingly, you violated and remain in violation of Tennessee Air Pollution Control Regulation 1200-3-9-.01(4) by making these modifications to Kingston Units 6 and 8 without first obtaining PSD permits, without first installing BACT, without first meeting other PSD program requirements that are in the Tennessee SIP, and by continuing to operate this unit without complying with such requirements. Further, you violated and remain in violation of Tennessee Air Pollution Control Regulation 1200-3-9-.01(1) by making these modifications without first obtaining minor NSR permits.

5. John Sevier Unit 3

Since 1986, you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications at John Sevier Unit 3. In particular, in 1986, you made "major modifications," as that term is defined by the Tennessee SIP, Tennessee Air Pollution Control Regulation 1200-3-9-.01(4)(b)(2), at John Sevier Unit 3 through a significant overhaul of this unit that included, but is not limited to, the replacement of all waterwall tubes in front, rear, and sidewalls of both furnaces, replacement of all burner tube panels in both furnaces, and replacement of superheater platen elements. These changes created the potential for, and/or resulted in a significant net

emissions increase of SO2 and NOx. You performed such work without first obtaining a PSD permit. Further, since 1990 you have operated this unit without a PSD permit.

Accordingly, you violated and remain in violation of Tennessee Air Pollution Control Regulation 1200-3-9-.01(4) by making these modifications to John Sevier Unit 3 without first obtaining a PSD permit, without first installing BACT, without first meeting other PSD program requirements that are in the Tennessee SIP, and by continuing to operate these units without complying with such requirements. Further, you violated and remain in violation of Tennessee Air Pollution Control Regulation 1200-3-9-.01(1) by making these modifications without first obtaining a minor NSR permit.

6. Paradise Units 1, 2, and 3

Since 1984, you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications at Paradise Unit 1, 2, and 3. In particular, you made "major modifications," as that term is defined in the federal PSD rules and in the Kentucky SIP, through a significant overhaul of these units in 1984 and 1985 that included, but is not limited to, the replacement and redesign of the cyclone burners and lower furnace walls, including headers and floors for Paradise Units 1, 2, and 3. Specifically, you replaced all fourteen cyclone burners at each of Units 1 and 2 and replaced all twenty-three cyclone burners at Unit 3. In addition, you cut out and replaced significant portions of the waterwall at Units 1, 2, and 3. The magnitude of the work required you to construct monorails at the front and rear walls for

lifting and positioning the cyclones at each unit. You also installed a trolley system to transport the cyclones in and out of the building and constructed rigging inside the furnace to assist in attaching the wall panels and floor panels. These changes created the potential for, and/or resulted in a significant net emissions increase of particulate matter, SO2, and NOx. You performed such work without first obtaining PSD and NSR permits. Further, since 1990 you have operated these units without PSD or NSR permits.

Accordingly, you violated and remain in violation of the federal PSD rules at 40 C.F.R. §§52.21 by making these modifications without first obtaining PSD permits, without first installing BACT, without first meeting other PSD program requirements that are in the Kentucky SIP, and by continuing to operate these units without complying with such requirements. You also violated and remain in violation of the Kentucky SIP NSR rules at 401 KAR 51:050 (45 Fed. Reg. 6092) by making these modifications without first obtaining NSR permits, without installing LAER, without first meeting other NSR program requirements that are in the Kentucky SIP, and by continuing to operate these units without complying with such requirements.

7. Shawnee Units 1 and 4

Since 1989, you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications at Shawnee Units 1 and 4. In particular, you made "major modifications," as that term is defined in the federal PSD rules and in the Kentucky SIP, through a significant overhaul of these units in 1989 and 1990 that included, but is not limited to, the replacement and redesign of the

secondary superheater and reheater pendant and crossover elements including header stubs. These changes created the potential for, and/or resulted in a significant net emissions increase of SO2, NOx, and particulate matter. You performed such work without first obtaining PSD permits. Further, since 1989 and 1990 you have operated these units without PSD permits.

Accordingly, you violated and remain in violation of the federal PSD rules at 40 C.F.R. §§52.21 and, beginning October 2, 1989, the state PSD rules at 401 KAR 51:017 by making these modifications without first obtaining a PSD permit, without first installing BACT, without first meeting other PSD program requirements that are in the Kentucky SIP,2 and by continuing to operate these units without complying with such requirements.

8. Colbert Unit 5

Since 1982, you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications at Colbert Unit 5. In particular, you made "major modifications" as that term has been defined in the Alabama SIP, through a significant overhaul of this unit in 1982 that included, but is not limited to, the replacement and redesign of the waterwalls and horizontal reheater, modified the startup system, modified the superheater by adding wingwalls in the furnace, replaced the gas proportioning dampers, replaced the windbox, redesigned and replaced the control system, and added a balanced draft conversion system. These changes created the potential for, and/or resulted in a significant net emissions increase of particulate matter and NOx. These changes also resulted in an increase

in the potential emission rate above 100 tons per year of SO2. You performed such work without first obtaining a PSD or NSR permit. Further, since 1990 you have operated this unit without a PSD or NSR permit.

Accordingly, you violated and remain in violation of the applicable Alabama PSD rule3 by making these modifications without first obtaining a PSD permit, without first installing BACT, without first meeting other PSD program requirements that are in the Alabama SIP, and by continuing to operate this unit without complying with such requirements. You also violated and remain in violation of the applicable Alabama NSR rule4 by making these modifications without first obtaining an NSR permit, without installing LAER, without first meeting other NSR program requirements, and by continuing to operate these units without complying with such requirements. You also violated the Alabama minor source construction permit rule, ADEM Regulation 16.1.1, which was incorporated into the federally approved Alabama SIP on November 26, 1979 (44 Fed. Reg. 67,375), and became effective November 26, 1979.5

9. Widows Creek Unit 5

Since 1989, you have been in violation of the Clean Air Act every day after making numerous unpermitted modifications at Widows Creek Unit 5. In particular, you made "major modifications" as that term has been defined in the Alabama SIP, through a significant overhaul of this unit in 1989 that included, but is not limited to, the replacement and redesign of all of the secondary superheater pendant elements, reheater elements, and crossover elements.

Additionally, you redesigned the tubing to use different materials, ultimately replacing approximately 43% of the tubing in the boiler. These changes created the potential for, and/or resulted in a significant net emissions increase of SO2 and NOx. You performed such work without first obtaining a PSD and NSR permit. Further, since 1990 you have operated this unit without a PSD or NSR permit.

Accordingly, you violated and remain in violation of the applicable Alabama PSD rule6 by making these modifications without first obtaining a PSD permit, without first installing BACT, without first meeting other PSD program requirements that are in the Alabama SIP, and by continuing to operate this unit without complying with such requirements. You also violated and remain in violation of the applicable Alabama NSR rule7 by making these modifications without first obtaining an NSR permit, without installing LAER, without first meeting other NSR program requirements, and by continuing to operate this unit without complying with such requirements. By failing to obtain and thereafter comply with a construction permit you are also in violation of the Alabama minor source construction permit rule, ADEM Regulation 16.1.1, approved in the Alabama SIP on August 28, 1985 (50 Fed. Reg. 34,804), effective October 28, 1985.8

II. NSPS VIOLATIONS AT COLBERT UNIT 5

In addition to the violations set forth above, you also violated regulations known as New Source Performance Standards ("NSPS") at Colbert Unit 5. Pursuant to Section 111 of the Clean Air Act, 42 U.S.C. §§7411, EPA has promulgated standards of performance for a variety of major air pollution source

categories, including electric utility steam generating units. These standards apply to the owner or operator of any electric utility steam generating unit, "the construction or modification of which is commenced after the date of publication . . . of any standard . . . applicable to that facility." 40 C.F.R. §§ 60.1(a) and §§§§ 60.40a-49a (Subpart Da). The changes you made to Colbert Unit 5 in 1983 that are discussed above caused an increase in the maximum hourly emissions rate achievable by the unit and therefore constituted a "modification" as that term is defined at 40 C.F.R. §§§§ 60.2 and 60.14(a). Accordingly, beginning in 1983, you were required to meet all of the requirements of Subpart Da, and you have failed every day thereafter to do so.

III. OPACITY VIOLATIONS AT THE JOHNSONVILLE FOSSIL PLANT

In your operation of the Johnsonville facility, you have regularly violated for at least the last five years the 20 percent opacity limit in the Tennessee SIP (40 C.F.R. §§52.2220 et seq.; TAPCR 1200-3-5-.01(1)). You continue regularly to violate such limit. You have also regularly violated for at least the last five years the requirement in the Tennessee SIP to submit, on a quarterly basis, complete reports of all of your opacity readings in excess of 20 percent. (40 C.F.R. §§52.2220 et seq.; TAPCR 1200-3-10-.02 (2)(b)). You continue regularly to violate such requirement.

IV. CONCLUSION

Your civil penalty liability for these violations is at least for the last five years. You are responsible for employing practices to prevent such violations, and you are responsible for implementing measures

immediately to prevent further violations. Air pollution control technologies to prevent such violations have been, and continue to be, readily available. Although not necessary to sustain a cause of action, the suit will also allege that your violations have contributed to the unnecessary degradation of air quality in Tennessee, Kentucky, and Alabama, and the impairment of visibility and other air quality related values in the Great Smoky Mountains National Park, Shenandoah National Park, and other Class I areas.

The address of NPCA is 1300 Nineteenth Street, NW, Suite 300, Washington, DC 20036. NPCA has individual members who have been, and continue to be, injured by the excessive and unlawful emissions from the above-mentioned facilities. If you have any questions regarding the allegations in this notice, believe any of the foregoing information to be in error, or wish to discuss a settlement of this matter prior to the initiation of litigation, please contact any one of the attorneys below.

Yours Sincerely,

s/ Reed Zars	s/ George Hays	s/ William Moore
Reed Zars	George Hays	William J. Moore
Attny at Law	Attny at Law	Henrichsen Siegel
2020 Grand Ave #522	236 W Portal Ave #110	200 E Forsyth St
Laramie, WY 82070	SF, CA 94127	Jacksonville, FL 32202
307-745-7979	415-716-9159	904-355-2233

SIERRA CLUB'S 60-DAY NOTICE LETTER

December 13, 2000
BY CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

Chairman Craven Crowell
Tennessee Valley Authority
Corporate Headquarters
400 W. Summit Hill Dr.
Knoxville, TN 37902-1499

RE: **Notice of Intent to Sue for Violations of the Clean Air Act at the Allen, Bull Run, Cumberland, Kingston, John Sevier, Paradise, Shawnee, Colbert, Widows Creek, and Johnsonville Fossil Plants.**

Dear Chairman Crowell:

We are writing on behalf of the Sierra Club to notify you of its intent to file suit on behalf of itself and its members for the same violations of the Clean Air Act set forth in the October 30, 2000 notice letter sent to you from the National Parks and Conservation Association ("NPCA").

The address of Sierra Club is 85 Second Street, San Francisco, California 94105. Sierra Club has individual members who have been, and continue to be, injured by the excessive and unlawful emissions from the above-mentioned facilities. If you have any

questions regarding the allegations in this notice, believe any of the foregoing information to be in error, or wish to discuss a settlement of this matter prior to the initiation of litigation, please contact any one of the attorneys below.

Yours Sincerely,

s/ Reed Zars	s/ George Hays	s/ William Moore
Reed Zars	George Hays	William J. Moore
Attny at Law	Attny at Law	Henrichsen Siegel
2020 Grand Ave #522	236 W Portal Ave #110	200 E Forsyth St
Laramie, WY 82070	SF, CA 94127	Jacksonville, FL 32202
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STATUTORY AND REGULATORY PROVISIONS

28 U.S.C. § 2462

Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

Clean Air Act

Section 111 [42 U.S.C. § 7411]

Standards of performance for new stationary sources

(a) Definitions. For purposes of this section:

* * * * *

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

* * * * *

Section 165 [42 U.S.C. § 7475]

Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless–

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

* * * * *

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to

regulation under this chapter emitted from, or which results from, such facility

* * * * *

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source

* * * * *

Section 169 [42 U.S.C. § 7479]

Definitions

For purposes of this part –

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur

recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

* * * * *

(2)(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 111(a)) of any source or facility.

(3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative

fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

* * * * *

Section 171 [42 U.S.C. § 7501]

Definitions

For the purpose of this part–

* * * * *

(3) Lowest achievable emission rate

The term "lowest achievable emission rate" means for any source, that rate of emissions which reflects--

(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.

(4) Modifications; modified

The terms "modifications" and "modified" mean the same as the term "modification" as used in section 7411(a)(4) of this title.

Section 172 [42 U.S.C. § 7502]

Nonattainment plan provisions in general

* * * * *

(c) Nonattainment plan provisions

The plan provisions (including plan items) required to be submitted under this part shall comply with each of the following:

* * * * *

(5) Permits for new and modified major stationary sources

Such plan provisions shall require permits for the construction and operation of new or modified major

stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title.

* * * * *

Section 173 [42 U.S.C. § 7503]

Permit requirements

(a) In general

The permit program required by section 7502(b)(6) of this title shall provide that permits to construct and operate may be issued if--

(1) in accordance with regulations issued by the Administrator for the determination of baseline emissions in a manner consistent with the assumptions underlying the applicable implementation plan approved under section 7410 of this title and this part, the permitting agency determines that--

(A) by the time the source is to commence operation, sufficient offsetting emissions reductions have been obtained, such that total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources (as determined in accordance with the regulations under this paragraph) prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under section 7502

of this title) reasonable further progress (as defined in section 7501 of this title); or

(B) in the case of a new or modified major stationary source which is located in a zone (within the nonattainment area) identified by the Administrator, in consultation with the Secretary of Housing and Urban Development, as a zone to which economic development should be targeted, that emissions of such pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emissions levels which exceed the allowance permitted for such pollutant for such area from new or modified major stationary sources under section 7502(c) of this title;

(2) the proposed source is required to comply with the lowest achievable emission rate.

* * * * *

Section 304 [42 U.S.C. § 7604]

Citizen suits

(a) Authority to bring civil action; jurisdiction. Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf –

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation

has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a limitation,

* * * * *

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

* * * * *

(b) Notice. No action may be commenced –

(1) under subsection (a)(1) of this section –

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violations occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

* * * * *

(f) "Emission standard or limitation under this chapter" defined

For purposes of this section, the term "emission standard or limitation under this chapter" means--

* * * * *

(4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations

* * * * *

Code of Federal Regulations, Title 40

Chapter 1--Environmental Protection Agency

Subchapter C–Air Programs

Part 54–Prior Notice of Citizen Suits

40 C.F.R. § 54.3 (1971)

Contents of notice

* * * * *

(b) Violation of standard, limitation or order. Notices to the Administrator, States, and alleged violators regarding violation of an emission standard or limitation or an order issued with respect to an emission standard or limitation, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order which has allegedly been violated, the activity alleged to be in violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name and address of the person giving the notice.

Part 60–Standards of Performance for New Stationary Sources

Subpart A–General Provisions

40 C.F.R. § 60.14

Modification

(a) Except as provided under paragraphs (e) and (f) of this section, any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act. Upon modification, an existing facility shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the emission rate to the atmosphere.

(b) Emission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere for which a standard is applicable....

* * * * *

(e) The following shall not, by themselves, be considered modifications under this part:

(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category, subject to the provisions of paragraph (c) of this section and §60.15.

(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital

Part 60–Standards of Performance for New Stationary Sources

Subpart A–General Provisions

40 C.F.R. § 60.15

Reconstruction

(a) An existing facility, upon reconstruction, becomes an affected facility, irrespective of any change in emission rate.

(b) "Reconstruction" means the replacement of components of an existing facility to such an extent that:

(1) The fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable entirely new facility, and

(2) It is technologically and economically feasible to meet the applicable standards set forth in this part.

(c) "Fixed capital cost" means the capital needed to provide all the depreciable components.

* * * * *

Part 60–Standards of Performance for New Stationary Sources

40 C.F.R. § 60.43Da

Standard for sulfur dioxide (SO_2)

(a) On and after the date on which the initial performance test is completed or required to be completed under § 60.8, whichever date comes first, no owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere from any affected facility which combusts solid fuel or solid-derived fuel and for which construction, reconstruction, or modification commenced before or on February 28, 2005, except as provided under paragraphs (c), (d), (f) or (h) of this section, any gases that contain SO_2 in excess of:

(1) 520 ng/J (1.20 lb/MMBtu) heat input and 10 percent of the potential combustion concentration (90 percent reduction); or

(2) 30 percent of the potential combustion concentration (70 percent reduction), when emissions are less than 260 ng/J (0.60 lb/MMBtu) heat input.

* * * * *

RULES and REGULATIONS

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[AL-012; A-4-FRL-2888-2]

Alabama; Approval and Promulgation of Implementation Plans; Approval of Air

Permit Requirements Revision

Wednesday, August 28, 1985

*34804 AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Alabama Department of Environmental Management (ADEM) submitted revisions to its air permit requirements to EPA, Region IV, on March 28, 1985. These revisions replace the present permits with one air permit, clarify the conditions which subject the air permit to revocation, and allow the Director of ADEM to delegate to the local air pollution control agencies the authority to issue air permits. EPA is today approving these revisions.

EFFECTIVE DATE: This action will be effective on October 28, 1985, unless notice is received within 30 days that someone wishes to submit adverse or critical comments.

ADDRESSES: Written comments should be addressed to Kelly McCarty of EPA Region IV's Air Management Branch (see EPA Region IV address below). Copies of the materials submitted by Alabama may be examined during normal business hours at the following locations:

Air Division, Alabama Department of Environmental Management, 1751 Federal Drive, Montgomery, Alabama 36109.

Environmental Protection Agency, Region IV, Air Management Branch, 345 Courtland Street, N.E., Atlanta, Georgia 30365

Public Information Reference Unit, Library Systems Branch, Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460

Library, Office of the Federal Register, 1100 L Street, N.W., Room 8401, Washington, D.C. 20005

FOR FURTHER INFORMATION CONTACT:Ms. Kelly McCarty, Air Management Branch, EPA Region IV, at the above address, and phone 404/881-3286, or FTS 257-3286.

SUPPLEMENTARY INFORMATION: On February 19, 1985, the ADEM submitted revisions to its State Implementation Plan (SIP) for air permit requirements. These revisions to Chapter 16 of the Air Division Regulations accomplished the following: (1) Replaced the present permits to construct, temporary permits, and permits to operate with one

air permit, and, (2) clarified the conditions which subject the air permit to revocation.

All the various air permits have been consolidated into one air permit issued prior to construction. Authorization from the Director must be obtained in order to begin operation. The air permit authorizing construction is good for two years, at which time, if construction has not begun, the air permit and application will be cancelled.

Prior to this revision, there was no section in Alabama's Air Division Regulations which delineated the conditions under which a permit is subject to revocation. A new section 16.2.4, "Revocation of Air Permits", has now been added. These conditions include:

- Failure to comply with any conditions of the permit;

- Failure to notify the Director prior to operation;

- Failure to establish and maintain required records;

- Failure to allow employees of the Department access;

- Failure to comply with any provisions of any applicable Department Administrative order;

- Failure to comply with the rules and regulations of the Department; or

- For any other cause that a hearing establishes that continuation of the permit is inconsistent with the purpose of the Alabama Air Pollution Control Act or regulations under it.

On March 28, 1985, the ADEM submitted an additional revision to its (SIP) for air permit requirements. This revision allowed the Director of ADEM to delegate authority to the local air pollution control agencies to issue air permits. Delegation of this authority is subject to several requirements. These are:

- The local agency must adopt regulations to ensure that the permit applicant is subject to all the requirements contained in ADEM's regulations.

- The local agency must adopt regulations to allow the Director of ADEM the opportunity to review the permit application, the analysis of the permit, and proposed permit conditions at least 10 days prior to permit issuance.

- The local agency must demonstrate that it has the necessary manpower and technical expertise to implement the requirements of the regulations.

- The local agency must adopt regulations which require them to provide the Director of ADEM a copy of preliminary determinations and public comment notices for all permits issued at the same time the notice is forwarded for publication.

These revisions also allow the Director of ADEM to revoke this delegation, in whole or part, if he determines that the local agency is ineffectively implementing the requirements, or if the local agency's procedures for implementing the requirements are inadequate. The Director of ADEM still has the authority to revoke any permit he deems to be inadequate. All permits issued by local agency are enforceable by the ADEM.

Previously, the permit application was submitted to the local agency, reviewed, and the analysis sent to ADEM for final *34805 approval for both minor and major sources. Signatures from both the local agency and ADEM had to be on the permit for it to be considered enforceable.

Final Action

EPA has reviewed these revisions to the Alabama SIP and is approving them as submitted. This action is taken without prior proposal because the changes are non-controversial and EPA anticipates no comments on them. The public should be advised that this action will be effective 60 days from the date of this Federal Register notice. However, if notice is received within 30 days that someone wishes to submit adverse or critical comments, this action will be withdrawn, and two subsequent notices will be published before the effective date. One notice will withdraw the final action, and the other will begin a new rulemaking by announcing a proposal of the action and establishing a comment period.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 28, 1985. This action may not be challenged later in proceedings to enforce its requirements (see 307(b)(2).)

Under 5 U.S.C. 605(b), the Administrator has certified that SIP approvals do not have a significant economic impact on a substantial number of small entities. (see 46 FR 8709.)

Incorporation by reference of the Alabama State Implementation Plan was approved by the Director of the Federal Register on July 1, 1982.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

List of Subjects in 40 CFR Part 52

Air pollution control, Intergovernmental relations, Incorporation by reference.

Dated: August 20, 1985.

Lee M. Thomas, Administrator.

Part 52 of Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

PART 52--[AMENDED]

Subpart B--Alabama

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7642.

2. Section 5250 is amended by adding paragraph (c)(39) as follows:

40 CFR § 52.50

§ 52.50 Identification of plan.

* * * * *

(c) The plan revisions listed below were submitted on the dates specified.

* * * * *

(39) Changes to air permit requirements, submitted on February 19, 1985, and on March 28, 1985, by the Alabama Department of Environmental Management (ADEM).

(i) Incorporation by reference.

(A) Amendment to ADEM Air Rules & Regulations Chapter 16.1, submitted on March 28, 1985, and State-adopted on March 13, 1985. Allows delegation of permitting authority to locals.

(B) Amendment to ADEM Air Rules & Regulations Chapter 16.1, 16.2, 16.3, and 16.4, submitted on February 19, 1985, and State-adopted on February 13, 1985. Consolidates Permit to Construct, Operate and Temporary Permit, into one Air Permit.

(ii) Additional Information.

(A) None.

[FR Doc. 85-20478 Filed 8-27-85; 8:45 am]

BILLING CODE 6560-50-M

50 FR 34804-01, 1985 WL 124566 (F.R.)

END OF DOCUMENT

Alabama State Implementation Plan ("SIP")

Alabama Air Pollution Control Commission ("AAPCC") Reg. 16.1.1 Types of Permits (1979)

(a) Permit to Construct. Any person building, erecting, altering, or replacing any article, machine, equipment, or other contrivance, the use of which may cause the issuance of or an increase in the issuance of air contaminants or the use of which may eliminate or reduce or control the issuance of air contaminants, shall first obtain authorization for such construction from the Director in the form of a Permit to Construct. A Permit to Construct shall remain in effect until the Permit to Operate the equipment for which the application was filed is granted or denied or the application is canceled.

(b) Permit to Operate.

(1) Before any article, machine, equipment, or other contrivance described in paragraph (a) may be operated or used, a written permit shall be obtained from the Director. No Permit to Operate shall be granted for any article, machine, equipment, or contrivance described in paragraph (a), constructed or installed without authorization as required by paragraph (a), until the information required is presented to the Director and such article, machine, equipment, or contrivance is altered, if necessary, and made to conform to the standards established by the Commission.

(2) Any article, machine, equipment, or other contrivance described in paragraph (a) which is presently operating (or which is not presently operating but which is capable of being operated) without a Permit to Operate, may continue to operate (or may restart) only if its owner or operator obtains a Permit to Operate prior to a date to be set by the Director (or prior to restarting).

* * * * *

Alabama Air Pollution Control Commission ("AAPCC") Reg. 16.3.2 (1979)

Permits to Construct in or near Nonattainment Areas.

* * * * *

(b) Definitions. For purposes of this Section, the following terms will have the meanings ascribed in this Paragraph:

* * * * *

(4) "Major Modification" shall mean any physical change in, change in the method of operation of, or addition to a facility which increases the.potential emission rate of any air pollutant specified in Subpwagraph:16.3.2(b)(3) above (including any not previously emitted and taking into account all accumulated increases in potential emissions occurring at the facility since February 16, 1979; or since the time of the last construction approval issued for the facility pursuant to this Section, whichever time is

more recent, and regardless of any emission reductions achieved elsewhere in the facility) by 100 tons per year or more.

(i) A physical change shall not include routine maintenance repair, and replacement.

(ii) A change in the method of operation, unless limited by previous permit conditions, shall not include:

(A) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(B) In increase in the houfs or operation;

(C) Use of an alternative fuel or raw material, if on December 21, 1976, the source was capable or accommodating such fuel or material; or

(D) Use of an alternative fuel or raw material by reason of an order in effect under Section 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation), or by reason of a natural gas curtailment plan in effect pursuant to the Federal Power Act.

(E) Use of an alternative fuel by reason of an order or rule under Section 125 of the Clean Air Act.

(F) Change in ownership of a source.

(G) Use of refuse derived fuel generated from municipal solid waste.

* * * * *

Alabama Air Pollution Control Commission ("AAPCC") Reg. 16.4.2 (1981)

Definitions.

For the purposes of this Part only, the following terms will have meanings ascribed in this Section:

* * * * *

(b)(1) "Major Modification" shall mean any physical change in or change in the method of operation of a major stationary source that would result in significant (see Paragraph 16.4.2 (w)) net emissions increase (see Paragraph 16.4.2 (c)) of any pollutants subject to regulation under the CAA.

* * * * *

Ala. Admin. Code Rule 335-3-14-.01 (current)

General Provisions

(1) Air Permit.

(a) Any person building, erecting, altering, or replacing any article, machine, equipment, or other contrivance, the use o f which may ca use the issuance of or an increase in the issuance of air contaminants or th e use of which may eliminate or reduce or control the issuance of air contaminates, shall submit an

application for an Air Permit at least 10 days prior to construction.

(b) Before any article, machine, equipment, or other contrivance described in sub paragraph (a) of this paragraph may b e operated or used, authorization shall be obtained from the Director in the form of an Air Permit. No permit shall be granted for any article, machine, equipment or contrivance described in subparagraph (a) of this paragraph, constructed or installed without notification as required by subparagraph (a) of this paragraph, until the information required is presented to the Director and such article, machine, equipment or contrivance is altered, if necessary, and made to conform to the standards established by the Department.

(c) Any article, machine, equipment, or other contrivance described in subparagraph (a) of this paragraph which is presently operating (or which is not presently operating bu t which is capable of being operated) without an Air Permit may continue to operate (or may restart) only if its owner or operator obtains an Air Permit prior to a date to be set by the Director (or prior to restarting).

* * * * *

Ala. Admin. Code Rule 335-3-14-.04 (current)

(9) Control Technology Review.

* * * * *

(c) A major modification shall apply BACT for each pollutant subject to regulation under the for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant occur as a result of a physical change or change in the method of operation in the unit.

* * * * *

Ala. Admin. Code Rule 335-3-14-.05 (current)

(3) Applicability.

Except as provided in paragraphs (4), (5), and (6), no Air Permit shall be issued to a person proposing to construct or make a major modification to a major facility (for the pollutant for which the area has been designated nonattainment) in a nonattainment area or which will have a significant impact if located outside the nonattainment area unless:

(a) The person demonstrates that the new source or the major modification will meet an emission limitation, said emission limitation to be the lowest achievable emission rate (LAER) for that source or facility

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SUPREME COURT, U.S.

No. 07-867

In the Supreme Court of the United States

NATIONAL PARKS CONSERVATION ASSOCIATION, ET AL., PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the pre-1985 version of Alabama's Clean Air Act State Implementation Plan (SIP) did not impose an ongoing obligation to comply with the SIP's New Source Review requirements, as implemented through a preconstruction permitting program.

2. Whether the court of appeals erred in concluding that petitioners' claims for equitable relief were subject to the same five-year limitation period that applies to claims for civil penalties under 28 U.S.C. 2462.

3. Whether petitioners' pre-suit notice was sufficiently specific with respect to petitioners' claims under the Clean Air Act's New Source Performance Standards.

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In the Supreme Court of the United States

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NATIONAL PARKS CONSERVATION ASSOCIATION, ET AL., PETITIONERS

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TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 502 F.3d 1316. A decision of the district court (Pet. App. 32a-47a) is reported at 413 F. Supp. 2d 1282. Previous orders of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 2007. The petition for a writ of certiorari was filed on January 2, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, was enacted "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b)(1). In 1970, Congress added the New Source Performance Standards (NSPS) program, which establishes performance standards for new or modified pollutant-emitting facilities in certain categories. See 42 U.S.C. 7411. In 1977, Congress further amended the CAA by establishing the New Source Review (NSR) program, which addresses the impact on ambient air quality resulting from newly constructed or modified pollutant-emitting facilities. The NSR program has two elements: a Prevention of Significant Deterioration (PSD) program applying in areas of the country that do not violate ambient air quality standards, 42 U.S.C. 7470-7479, and a Nonattainment NSR (NNSR) program for areas that fail to satisfy ambient air quality standards, 42 U.S.C. 7501-7515 (2000 & Supp. V 2005). See generally *Environmental Def.* v. *Duke Energy Corp.*, 127 S. Ct. 1423, 1429 (2007) (discussing purpose of NSR program).

Under the PSD program, "[n]o major emitting facility * * * may be constructed" or modified without first meeting several requirements. 42 U.S.C. 7475(a); see 42 U.S.C. 7479(2)(C) ("construction" includes "modification" as defined in 42 U.S.C. 7411(a)); *Duke Energy*, 127 S. Ct. at 1429. Among those requirements, a facility must obtain a permit for the construction or modification "setting forth emission limitations * * * which conform to [the CAA]," and must be "subject to the best available control technology," or BACT, "for each pollutant subject to regulation." 42 U.S.C. 7475(a)(1) and (4).

As relevant here, the NNSR program's requirements are generally similar to those of the PSD program, see, *e.g.*, 42 U.S.C. 7503(a), although the pertinent provisions of the NNSR program require that a source meet the "lowest achievable emission rate" rather than apply BACT, 42 U.S.C. 7503(a)(2).

States may implement many of the CAA's provisions, including the PSD and NNSR programs, by adopting a State Implementation Plan (SIP). SIPs must meet federal standards, are subject to review and approval by the Environmental Protection Agency (EPA), and are federally enforceable once approved. See 42 U.S.C. 7410(a)(2)(D) and (k), 7413, 7471; 40 C.F.R. 51.166(a)(6).

Alabama's SIP has included an EPA-approved PSD program since 1981. 46 Fed. Reg. 55,517 (approving initial Alabama PSD regulations). The SIP's provisions prohibit construction of any major stationary source or major modification without complying with the requirements of the PSD program. Ala. Air Pollution Control Comm'n Reg. § 16.4.8 (1981). Alabama's SIP, including the PSD program, was revised in 1985. Pet. App. 20a.

The United States has authority to enforce SIP requirements in federal court. 42 U.S.C. 7413. The CAA also authorizes citizen suits for, *inter alia*, the violation of any emission standard or limitation established under the Act, including the violation of "any requirement to obtain a permit as a condition of operations." 42 U.S.C. 7604(a)(1) and (f).

2. The Tennessee Valley Authority (TVA) is a corporate agency and instrumentality of the United States, created and existing pursuant to the Tennessee Valley Authority Act of 1933, 16 U.S.C. 831-831ee (2000 & Supp. V 2005). TVA operates numerous electricity generating facilities in the southern United States.

In 1982 and 1983, TVA undertook a project to overhaul Unit 5 of its Colbert Fossil Plant (Colbert Unit 5), a coal-burning facility located in northwestern Alabama. TVA had a general Alabama operating permit for that unit, but did not seek a PSD permit for the new construction. Pet. App. 3a.

In 1999, EPA concluded that modifications to TVA's facilities, including Colbert Unit 5, were in violation of the CAA's NSR requirements and other provisions of law. EPA issued an administrative order directing TVA to comply with the CAA. TVA petitioned for review of that order in the Eleventh Circuit, which concluded that EPA's administrative proceedings, and the CAA provision under which the order was issued, violated due process. *TVA* v. *Whitman*, 336 F.3d 1236, 1244, 1260 (2003), cert. denied, 541 U.S. 1030 (2004). The court then held that the unconstitutionality of the CAA provision meant that EPA's order was not a "final agency action" and that the court of appeals therefore lacked jurisdiction to review it. See *id.* at 1248, 1260.

3. In October 2000, while EPA's administrative order was still being litigated, petitioners sent TVA a letter notifying it of petitioners' belief that Colbert Unit 5 was in violation of the CAA. Pet. App. 133a-152a. The letter asserted that TVA had undertaken a major modification at Colbert Unit 5 without a PSD or NNSR permit, and that the modified Colbert Unit 5 violated the applicable NSPS standards—specifically, "all the requirements of Subpart Da" of 40 C.F.R. Pt. 60. Pet. App. 146a-147a, 148a-149a.

Petitioners then filed this citizen suit against TVA in the United States District Court for the Northern District of Alabama. Petitioners, asserting that the project at Colbert Unit 5 was a "modification" that triggered the

NSR and NSPS requirements of the CAA, sought civil penalties and declaratory and injunctive relief. See Pet. App. 7a, 53a, 93a-94a. TVA moved to dismiss, asserting, *inter alia*, that claims for civil penalties would be barred by the five-year statute of limitations in 28 U.S.C. 2462; that the claims for injunctive and declaratory relief were accordingly barred as well; and that petitioners had not provided adequate notice of their NSPS claim before filing suit, as required by 42 U.S.C. 7604(b)(1)(A).[1]

The district court agreed and granted summary judgment for TVA. Pet. App. 71a-83a (granting summary judgment on the NSPS claim for failure to provide adequate pre-suit notice); *id.* at 119a-130a (granting summary judgment on the PSD and NNSR claims for failure to comply with the five-year statute of limitations).[2] Petitioners appealed only as to their claims for equitable relief.

4. The court of appeals affirmed. Pet. App. 1a-31a.

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[1] Petitioners also sought partial summary judgment on the merits, which the district court denied on September 7, 2005, finding that issues of material fact were disputed. Petitioners appealed that decision as well, but the court of appeals did not address the underlying merits because it held the claims time-barred (Pet. App. 31a), and the merits issues are not encompassed within the petition. Petitioners err in describing as "undisputed" their assertion that the 1982-1983 projects "increase[d] the unit's pre-project capacity by 100 megawatts." Pet. 8-9 & n.3. TVA disputed below, and continues to dispute, that assertion. See, *e.g.*, TVA C.A. Br. 50-51.

[2] In a separate proceeding involving Sierra Club and TVA, the court of appeals had held that TVA's sovereign immunity barred petitioners from seeking civil penalties. *Sierra Club* v. *TVA*, 430 F.3d 1337, 1353-1357 (11th Cir. 2005). The district court accordingly dismissed the civil-penalty claims in this case, Pet. App. 89a-90a; plaintiffs did not appeal that issue.

a. Section 2462 provides that a claim for civil penalties is barred "unless commenced within five years from the date when the claim first accrued." Petitioners contended that their NSR claims were not time-barred because TVA's failure to comply with NSR requirements was an ongoing violation of the CAA, accruing anew each day that the unauthorized modification was operated. The court of appeals disagreed.[3]

The court stated that "the Alabama regulations in force at the time of TVA's work on Unit 5 * * * govern our inquiry." Pet. App. 17a. Examining those regulations as they existed in 1982, the court concluded that they had created only "a prerequisite for approval of the modification, not a condition of Unit 5's lawful operation." *Ibid.* Thus, the court held, the Alabama regulations imposed a one-time obligation to satisfy the statute's permitting requirements, not an ongoing one that was violated anew each day. Because the obligation applied only at the time of construction, petitioners' claim had long since become barred by the five-year statute of

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[3] The court of appeals referred to petitioners' theory as invoking "the continuing violations doctrine." Pet. App. 12a. Variations of that phrase have been used to describe several different legal rules, including a rule that a course of conduct, occurring over time, can constitute a single violation of law. Compare, *e.g.*, *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 118 (2002) ("[T]he incidents constituting a hostile work environment are part of one unlawful employment practice, [and] the employer may be liable for all acts that are part of this single claim."), with *id.* at 125 (O'Connor, J., concurring in part and dissenting in part) ("[A] hostile environment is a form of discrimination that occurs every day; some of those daily occurrences may be time barred, while others are not."). In this case, petitioners contend (Pet. 19-20) that TVA's operation of Colbert Unit 5 amounted to a new violation each day. For clarity, this brief describes the legal issue as whether TVA's alleged actions were an "ongoing" violation.

limitations. *Id.* at 12a-14a. The court of appeals recognized that other courts had found an ongoing obligation to comply with those requirements, but concluded that the state programs in those cases had differed in important respects from the Alabama SIP that was in force in 1982. *Id.* at 14a, 19a. "Were this case governed by [another State's] environmental regulations," the court acknowledged, the outcome might well be different, but "an important difference" in Alabama's SIP "ultimately preclude[d]" the court of appeals from accepting petitioners' ongoing-obligation theory. *Id.* at 16a, 18a-19a. Specifically, the court thought that the Alabama regulations provided no way (and thus no obligation) to obtain a construction permit once a modification had already been completed. See *id.* at 18a.

The court of appeals recognized that in 1985, Alabama had amended its SIP to require an Air Permit as a condition of both construction *and* operation. Pet. App. 20a. The court viewed those amendments as having "no significance" for this case, however, because they had not been in force when Colbert Unit 5 was modified between 1982 and 1983, and because petitioners' pre-1985 *operating* permit grandfathered it into the post-1985 regulatory regime, which did not create retroactive liability. *Id.* at 20a-21a.

b. The court of appeals recognized that Section 2462 applies on its face only to "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture," not to claims purely for injunctive relief. Pet. App. 22a. Petitioners therefore argued that neither Section 2462 nor any other statute of limitations should apply to their claims for equitable relief. The court of appeals disagreed. Under the "concurrent remedy doctrine," the court held, "where a party's legal remedies

are time-barred, that party's concurrent equitable claims generally are barred" by the same time limitation. *Ibid.* That doctrine foreclosed petitioners' equitable claims. *Id.* at 22a-25a.

The Eleventh Circuit has held that the concurrent remedy doctrine does not apply to "claims brought by the federal government in its sovereign capacity." Pet. App. 22a (quoting *United States* v. *Banks*, 115 F.3d 916, 919 (11th Cir. 1997), cert. denied, 522 U.S. 1075 (1998)). Petitioners contended that the same rule should apply to them because their citizen suit is in the nature of a "private attorney general" action. The court of appeals disagreed, because under the CAA petitioners were "acting 'on [their] own behalf.'" *Id.* at 23a (quoting 42 U.S.C. 7604(a)). The court accordingly declined to "expand[] the governmental exception" to the concurrent remedy doctrine. *Ibid.*

c. As to petitioners' NSPS claims, the court of appeals held that the pre-suit notice letter was inadequate because it was too broad and general. In the court's view, petitioners had "failed to provide enough information to permit TVA to identify the allegedly violated standards, dates of violation, and relevant activities with the degree of specificity required by the regulations." Pet. App. 29a. The notice "broadly alleged daily violations of an entire set of regulations," Subpart Da, "without specifically identifying the individual alleged violations and dates." *Id.* at 25a. Subpart Da sets emission standards and other requirements for three pollutants. The suit alleged only noncompliance with the sulfur dioxide standard, which was "a much narrower claim" not particularly identified in petitioners' notice letter. See *id.* at 29a. Accordingly, the court of appeals affirmed

the dismissal of the NSPS claim for lack of proper pre-suit notice. *Id.* at 30a.

ARGUMENT

Further review is not warranted in this case. Although the court of appeals incorrectly treated petitioners' allegations as stating only a past violation, it did so principally in reliance on a misunderstanding regarding now-superseded provisions of a single State's pollution-control regulations.[4] That error is narrowly cabined and does not create a square conflict among the circuits that calls for resolution by this Court at this time. The court of appeals' other holdings—that private claims for equitable relief are subject to a time limit and that the particular pre-suit notice filed in this case was insufficiently specific—do not conflict with any decision of this Court or any other court of appeals or otherwise warrant this Court's plenary consideration.

1. The court of appeals misunderstood a number of features of the pre-1985 Alabama SIP provisions and the CAA scheme within which they operated, and the court's conclusion that those provisions did not create an ongoing obligation to comply was accordingly erroneous. The

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[4] The Eleventh Circuit has held that TVA has independent litigating authority in the lower courts, a conclusion with which the United States disagrees. See Pet. at 23-27, *Leavitt* v. *TVA*, 541 U.S. 1030 (2004) (No. 03-1162). Here, TVA argued to the district court and the court of appeals that petitioners' claims were time-barred because they did not allege a violation of an ongoing obligation. The Solicitor General, pursuant to his statutory and regulatory authority to determine the litigating position of the United States and its agencies and instrumentalities in cases brought before this Court (see 28 U.S.C. 516, 518(a), 519; 28 C.F.R. 0.20(a)), has considered competing views within the Executive Branch in arriving at a single, unified position for the federal government as a whole, which is set forth in this brief.

court acknowledged, however, that petitioners' claims likely would not be time-barred if Alabama's SIP were structured to create an ongoing obligation, and it expressly declined to apply the provisions of Alabama's amended SIP to this case. The court's conclusion that Section 2462's time bar applied was therefore based on the interpretation of now-superseded state regulations, an issue that does not warrant further review.[5]

a. The court of appeals reasoned that Alabama's pre-1985 SIP did not create a continuing obligation because the court was "not aware" of any provision in that SIP allowing a construction permit to be issued after completion of an unauthorized major modification or construction. Pet. App. 19a. That omission, the court of appeals asserted, showed that the SIP did not condition the lawful operation of a modified source on compliance with PSD requirements. See *id.* at 18a-19a. In the court's view, it was therefore "preclude[d]" from following the Sixth Circuit's holding in *National Parks Conservation Ass'n* v. *TVA*, 480 F.3d 410 (2007) (*National Parks*). Pet. App. 19a. In that case, petitioners challenged an overhaul at another TVA plant (in Tennessee). The Sixth Circuit concluded that although the alleged modification had taken place more than five years before the complaint was filed, the operation of the unpermitted modification (assuming *arguendo* that it was a "modification" for PSD purposes) was a recurring violation, and a violation therefore had occurred within the five-year limitation period. 480 F.3d at 417, 418-419. The court

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[5] Petitioners' complaint and the parties' briefs addressed claims arising under both the PSD and the NNSR provisions of the CAA. The court of appeals stated that "[t]he distinction between these two programs does not affect our analysis." Pet. App. 5a n.1.

based that conclusion on a provision of the Tennessee SIP allowing an unpermitted source to obtain a preconstruction permit after operations have begun. The different holding here, the Eleventh Circuit stated, was based on the "important difference in the states' plans." Pet. App. 19a.

In reality, however, the Alabama SIP provisions in effect at the time of the alleged modifications in this case *did* contain provisions imposing an ongoing obligation to comply with PSD requirements. The regulations had a section captioned "Types of Permits," with paragraphs captioned "Permit to Construct" and "Permit to Operate" respectively. Paragraph (a) provided that any person "erecting, altering, or replacing" regulated equipment was required to obtain a Permit to Construct, which "shall remain in effect until the Permit to Operate the equipment for which the application was filed is granted or denied." Ala. Air Pollution Control Comm'n Reg. § 16.1.1(a) (1979), Pet. App. 175a. Paragraph (b), captioned "Permit to Operate," provided in turn that any regulated equipment described in Paragraph (a) could not be operated or used without an operating permit, and that "[n]o Permit to Operate shall be granted for any article, machine, equipment, or contrivance described in paragraph (a), constructed or installed without authorization as required by paragraph (a), until the information required is presented to the Director," and the equipment in question was brought into compliance with applicable standards. Ala. Air Pollution Control Comm'n Reg. § 16.1.1(b) (1979), Pet. App. 175a-176a.

Those provisions, read together, imposed an ongoing requirement to comply with the PSD program, because a modified source could not lawfully be operated except after compliance with the SIP's preconstruction require-

ments. Under Paragraph (a), a facility that had been "erect[ed], alter[ed], or replac[ed]" was required to obtain a construction permit; under Paragraph (b), that altered facility could not be operated until it obtained an operating permit, through a process that refers back to Paragraph (a). Paragraph (b) even set forth a specific procedure for facilities constructed without advance authorization, further demonstrating that Alabama intended to create an ongoing obligation.

The court of appeals did not discuss or cite the relevant language of Section 16.1.1 of the Alabama regulations as applicable at the time of the alleged modification, presumably because petitioners did not cite that regulation to the court. Briefing in the court of appeals had focused primarily on interpretation of the Alabama SIP as amended in 1985 and in force today. See Pet. C.A. Br. 26-32; Pet. C.A. Reply Br. 4-7. The court, however, undertook to examine the Alabama regulations in force at the time of the alleged modification. See Pet. App. 17a ("The complaint charges TVA with violating the Alabama regulations in effect at the time of TVA's work on Unit 5, and these regulations govern our inquiry."). In that review the court found no provision "creating an ongoing obligation to comply with requirements of the preconstruction permitting process," Pet. App. 19a; it did not discuss the pre-1985 Section 16.1.1 in its opinion or explain whether or why that provision failed to perform the function the court of appeals thought was missing from the pre-1985 SIP.

The Alabama regulations in effect at the time of the alleged modification also imposed an ongoing obligation to apply BACT. Pet. App. 15a-16a (quoting Ala. Air Pollution Control Comm'n Reg. § 16.4.9(c) (1981), which provided that a major modification "shall apply"

BACT).[6] The court of appeals concluded that, because the SIP directed that BACT apply "to each *proposed* emissions unit," that requirement must have applied only to "proposed" modifications. Pet. App. 17a (quoting Ala. Air Pollution Control Comm'n Reg. § 16.4.9(c) (1981)). In fact, the term "proposed emissions unit" simply indicated that in the ordinary course, approval occurs before construction. The single word "proposed" was inadequate support for the court of appeals' construction, particularly because the BACT obligation by definition applies (continuously) to the *operation* of sources under the CAA framework. See p. 14, *infra*.

b. That the court of appeals misconstrued the pre-1985 Alabama SIP is confirmed by a correct understanding of the CAA framework within which the SIP operated. A SIP should be interpreted with due regard for the underlying CAA requirements, because SIPs must meet minimum standards set forth in the CAA and EPA's implementing regulations, are subject to EPA review and approval, and are federally enforceable once approved. *Navistar Int'l Transp. Corp.* v. *EPA*, 858 F.2d 282, 288 (6th Cir. 1988), cert. denied, 490 U.S. 1039 (1989); see also *Sierra Club* v. *Administrator, U.S. EPA*, 496 F.3d 1182, 1186 (11th Cir. 2007) (deferring to EPA's reading of a SIP); *American Cyanamid Co.* v. *United States EPA*, 810 F.2d 493, 498 (5th Cir. 1987) (same).

Here, there is strong structural and textual evidence that Congress, in enacting the PSD provisions, and

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[6] The Alabama PSD program imposed other ongoing obligations as well. See, *e.g.*, Ala. Air Pollution Control Comm'n Reg. § 16.4.12(b) and (c) (1981) (owner shall conduct air quality monitoring following construction).

EPA, in implementing them, intended to create an ongoing obligation. As a result, even if a SIP is ambiguous on the subject, a source remains in violation of the law until it has fulfilled PSD requirements.

i. The PSD provisions are by their terms ongoing requirements applicable to the operation of major emitting facilities. The most significant of those requirements provides that a permit must set forth "emission limitations" identified by the reviewing authority as "best available control technology." 42 U.S.C. 7475(a)(1) and (4). BACT is defined as an "emission limitation based on the maximum degree of reduction of each pollutant" emitted from a facility. 42 U.S.C. 7479(3). An "emission limitation" is defined in turn as a "requirement * * * which limits the quantity, rate, or concentration of emissions of air pollutants *on a continuous basis*, including any requirement relating to the operation or maintenance of a source to assure *continuous* emission reduction." 42 U.S.C. 7602(k) (emphases added). The use of the word "continuous" demonstrates that BACT is a continuing requirement that does not apply only at the time of construction. Thus, to meet the BACT requirement, a facility must both install and operate the required control technology.[7]

Other PSD provisions also make clear that they apply on an ongoing basis to a source's operation, rather

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[7] The BACT requirement is both a requirement applied through permitting and a freestanding requirement to install and operate the required control technology. Both requirements are ongoing, and are separately actionable. 42 U.S.C. 7475(a)(4); 40 C.F.R. 51.166 (j)(3); 45 Fed. Reg. 52,722 (1980) (stating that "Section 165 of the Act provides in part that any 'major emitting facility' constructed in a PSD area must apply best available control technology"); see also *id.* at 52,683; *National Parks*, 480 F.3d at 418.

than only for a finite time to the source's construction or modification. For example, the statute allows issuance of a permit only if "the owner or operator of such facility demonstrates * * * that emissions from construction *or operation* of such facility" will not compromise compliance with applicable air quality standards. 42 U.S.C. 7475(a)(3) (emphasis added). The statute also requires an owner or operator to submit to appropriate monitoring requirements, 42 U.S.C. 7475(a)(7); those, too, are ongoing, operational requirements. EPA's regulations for the federal PSD program (that is, the program applicable in areas that lack an approved SIP) therefore incorporate EPA's view that the Act is properly construed to impose a continuing statutory obligation to obtain a PSD permit even after construction.[8] Thus, the CAA does not itself draw the sharp distinction between preconstruction requirements and operating requirements that the court of appeals saw in the pre-1985 Alabama SIP.

The language of the CAA's enforcement provisions further confirms the foregoing analysis. For instance, 42 U.S.C. 7604(a)(1)(A) authorizes citizen suits for any "violation of * * * an emission standard or limitation," a category that includes "any requirement to obtain a permit as a condition of operations," 42 U.S.C. 7604(f)(4). Cf. 136 Cong. Rec. 36,083, 36,084 (1990)

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[8] See 40 C.F.R 52.21(r)(1) ("Any owner or operator who * * * operates a source or modification not in accordance with the application submitted pursuant to this section or with the terms of any approval to construct * * * shall be subject to appropriate enforcement action."). Under that provision, an owner or operator that secures an operating permit based on a particular description of its facility, and then makes a modification to that facility, is under an ongoing obligation to obtain a corrected permit.

(Senate managers' statement) (stating, with regard to the similarly structured governmental enforcement provisions, that the 1990 CAA amendments "confirm[] existing law," which allows EPA to "take[] enforcement action against operating sources that are in violation of [NSR] requirements" and to "halt the construction or modification of new sources that are violating new source review requirements").[9] The citizen and federal enforcement provisions of the CAA also permit civil penalties to be imposed for each day a violation continues. 42 U.S.C. 7413(b) and (e)(2). These provisions further support the view that the CAA creates ongoing obligations. *United States* v. *Marine Shale Processors*, 81 F.3d 1329, 1357 (5th Cir. 1996) (*Marine Shale*).

ii. The court of appeals also misperceived the framework of the CAA, incorrectly concluding that the statutory scheme sharply distinguished between preconstruction permits and operating permits. The court of appeals relied on that purported distinction in concluding that only the Alabama operating-permit requirements were ongoing and that the preconstruction requirements applied only at the time of construction.

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[9] The court of appeals found that distinct language of the citizen suit provision, 42 U.S.C. 7604(a)(3), which authorizes citizens to bring suit "against any person who proposes to construct or constructs" without a permit, signaled that Congress did not intend to allow suits based on ongoing violations during a facility's operation. Pet. App. 13a. To the contrary, 42 U.S.C. 7604(a)(1) provides precisely that remedy, as the definition contained in 42 U.S.C. 7604(f)(4) makes clear. Construing 42 U.S.C. 7604(a)(1) in accordance with its plain text to permit challenges to ongoing violations of the preconstruction requirements does not render 42 U.S.C. 7604(a)(3) superfluous; although the two provisions overlap somewhat by design, each of the two provisions also applies in circumstances where the other does not.

In reality, the CAA's PSD program creates a single permitting requirement, which is ordinarily satisfied before construction or modification of a facility. That approach allows emission-control requirements to be taken into account early in the design and construction process. A preconstruction permit, once issued, either serves as an operating permit for the facility in question or establishes conditions on the operation of the source that must be incorporated into the operating permit. Although some SIPs require separate construction and operating permits, the PSD requirements themselves impose conditions on a source's operations. *Marine Shale*, 81 F.3d at 1355-1356.[10]

The court of appeals cited the permitting provisions appearing in Title V of the CAA, 42 U.S.C. 7661 *et seq.*, which it described as the Act's operating-permit provisions. Pet. App. 13a. But Title V was not enacted until 1990, well after the alleged violations at issue in this case originated (and 13 years after the PSD program was enacted). Moreover, the function of Title V permits is to collect the requirements appearing elsewhere in the CAA, including but not limited to PSD requirements, into a single permit. See 42 U.S.C. 7661c(a) and (b); *United States* v. *Duke Energy Corp.*, 278 F. Supp. 2d 619, 651-652 (M.D.N.C. 2003), aff'd on other grounds, 411 F.3d 539 (4th Cir. 2005), vacated on other grounds *sub nom. Environmental Def.* v. *Duke Energy Corp.*, 127 S. Ct. 1423 (2007). The provisions of Title V generally do "not impose substantive new requirements." 40 C.F.R. 70.1(b); *Sierra Club* v. *Georgia Power Co.*, 443

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[10] The NNSR provisions of the CAA are even clearer in regulating both construction and subsequent operation. See 42 U.S.C. 7503(a) ("permits to construct and operate").

F.3d 1346 (11th Cir. 2006). The Title V program therefore could not properly be viewed as the operating-permit arm of the PSD program. The PSD program's ongoing operational requirements must be included in Title V permits, but those requirements exist independently, by virtue of the PSD provisions of the CAA. In suggesting that the PSD program's operating requirements derive from Title V, instead of from the PSD provisions themselves, the court of appeals misunderstood the relationship between the two programs. That error contributed to the court's failure to appreciate that the PSD program itself creates ongoing operational requirements.

iii. A reading under which the PSD requirement is ongoing also properly reflects Congress's intent in enacting the statute. The common-law analogue to Clean Air Act remedies is an action to abate a nuisance. At common law, such an action remains available during the continuation of the nuisance.[11] Thus, permitting obligations like those contained in the CAA are presumptively treated as ongoing in nature. See *Newell Recycling Co.* v. *United States EPA*, 231 F.3d 204 (5th Cir. 2000), cert. denied, 534 U.S. 813 (2001); *Carr* v. *Alta Verde Indus., Inc.*, 931 F.2d 1055, 1063 (5th Cir. 1991)); *Harmon*

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[11] "[E]ach day's continuance of a temporary nuisance creates a new cause of action," and therefore "the statute of limitations begins to run day by day, and plaintiff may at any time recover for the nuisance committed during the statutory period next before the bringing of the action." 1 Fowler V. Harper et al., *The Law of Torts* § 1.30, at 1:139 (3d ed. 1996); see also William L. Prosser, *Handbook of the Law of Torts* § 90, at 616 (3d ed. 1964) (noting that "a continuing trespass, such as the erection of a structure on the plaintiff's land, affords a continuing cause of action, which can hardly be distinguished from nuisance").

Indus., Inc. v. *Browner*, 19 F. Supp. 2d 988, 998 (W.D. Mo. 1998), aff'd, 191 F.3d 894, 904 (8th Cir. 1999).

Indeed, the very concept of "Prevention of Significant Deterioration"—which appears in the name of the program, 42 U.S.C. Ch. 85, Subch. I, Pt. C—suggests an ongoing requirement of compliance. When the PSD program was established, existing facilities were grandfathered, that is, allowed to defer installing emissions controls. But Congress intended that modification of those facilities would trigger the requirement to install such controls. *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979); *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901, 909 (7th Cir. 1990); *United States* v. *Cinergy Corp.*, 458 F.3d 705, 709 (7th Cir. 2006), cert. denied, 127 S. Ct. 2034 (2007). Congress could not simultaneously have intended that PSD requirements would apply only at the time of construction. Rather, once a facility has been modified, it has forfeited any subsequent claim to defer installing emissions controls. An ongoing requirement to apply PSD, with civil penalties for violations, is necessary to ensure a level playing field for all emitting sources, and to prevent emissions from one State from interfering with other States' efforts to comply with the CAA's standards. 42 U.S.C. 7470(4).[12]

c. Despite the court of appeals' misinterpretation of the pre-1985 Alabama SIP, that issue does not warrant plenary review at this time. The court of appeals' princi-

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[12] The legislative history of the NSR provisions contemplates that preconstruction requirements will subsequently be enforceable, stating that "[t]his preconstruction review process should help minimize the need for enforcement or other actions under the State implementation plan requiring additional post-construction control measures on the permitted plants." H.R. Rep. No. 294, 95th Cong., 1st Sess. 145 (1977).

pal error—*i.e.*, its failure to discuss or analyze the operative SIP provision, Section 16.1.1 of the pre-1985 Alabama regulations—was attributable to petitioners' failure to cite that provision to the court. Moreover, that error involves a particular provision of a single State's implementation plan, a plan that was amended more than twenty years ago to change the provisions on which the court's decision turned. That narrow holding does not require further review by this Court.

Not only does the court of appeals' decision not affect post-1985 construction in Alabama, it also lacks significance for the other two States within the circuit. Those States' SIPs have for many years contained provisions that explicitly condition the lawful operation of a source on compliance with the PSD program. See, *e.g.*, Ga. Comp. R. & Regs. r. 391-3-1-.02(1)(c) (1992); Fla. Admin. Code Ann. r. 62-212.400(7)(b) (2005); 44 Fed. Reg. 54,047 (1979) (approving Georgia provision); 48 Fed. Reg. 52,713 (1983) (approving Florida provision, which then appeared at Fla. Admin. Code Ann. r. 17-2.500(6)(c)). And even if Alabama, Georgia, or Florida were to amend its SIP in a way that implicated the court of appeals' reasoning, and even if EPA were to approve that modification without speaking to the existence of continuing obligations, other provisions in the State's air rules might well make this case distinguishable. Because the ongoing requirement to comply with PSD is an integral part of the CAA's scheme, that requirement may manifest itself in other parts of a SIP.

Petitioners principally claim that review is necessary because the Eleventh Circuit declined to follow the Sixth Circuit's reasoning in *National Parks*. The two decisions are not in direct conflict, however, as is apparent from their analysis. The court of appeals' decision in

this case was based on a close (albeit erroneous) reading of the wording of the SIPs; the court concluded that Alabama's SIP lacked an element that Tennessee's SIP contained, and that the difference was determinative. Pet. App. 19a. Thus, on the face of the court's opinion, there is no square conflict with the Sixth Circuit's decision. The Sixth Circuit found in Tennessee's SIP a provision making clear that compliance with PSD requirements is a condition of the lawful operation of a modified source. Such a provision appears in Alabama's current SIP. Accordingly, a failure to comply with either State's current requirements would be treated as an ongoing violation to the same extent in both circuits.

Petitioners also assert (Pet. 23-24) that the Eleventh and Sixth Circuits are in disagreement as to whether the obligation to install controls that meet BACT levels is ongoing. But as set out above, the Eleventh Circuit's BACT analysis appears to be tainted by its misunderstanding of SIP and PSD operational requirements and the relationship between the PSD and Title V programs. The Court's analysis may also have been tied to its misreading of the provisions of the Alabama SIP; it described the obligation to apply BACT as "solely a prerequisite for approval of the modification, not a condition of Unit 5's lawful operation, *under the relevant Alabama State Implementation Plan*." Pet. App. 17a (emphasis added).

In a footnote, the court of appeals did express doubts about the Sixth Circuit's reading of the BACT language of the Tennessee SIP. Pet. App. 18a n.2. But the court of appeals attached significance to the Tennessee SIP provision creating an ongoing duty to meet preconstruction requirements, *ibid.*, suggesting that this aspect of

the court's decision, too, depended on particular SIP language.

Petitioners' assertions (Pet. 13-14) of a "larger conflict" on this question rely principally on district court opinions, which generally are not a basis for seeking review in this Court. See Sup. Ct. R. 10(a). Petitioners also cite (Pet. 14-15) a handful of cases interpreting other statutes, but the Eleventh Circuit's interpretation of the CAA and the Alabama SIP does not implicate the reasoning of those decisions.

Because the Eleventh Circuit in this case relied on a perceived omission that no longer exists (and in fact did not exist even at the relevant time), the significance of the decision below is likely to be limited or nonexistent. For those reasons, this case is not a suitable vehicle for resolving abstract questions (divorced from their implementation in SIPs) about the nature of NSR obligations under the CAA.[13] If the courts of appeals come into direct conflict that is not readily susceptible to resolution through the regular SIP amendment process, then the issue may become ripe for this Court's review.[14]

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[13] An additional complicating factor is that, in an action brought by EPA, the agency would be entitled to deference in its interpretation of the Act and of SIP provisions that it has approved. Because this is a citizen action, no such deference was due to the views of either litigant. In future proceedings relating to the ongoing effect of NSR requirements, the responsible agencies may have an opportunity in the course of the litigation to explicate the appropriate interpretation of applicable SIP provisions. An action involving TVA is uniquely unsuited to that purpose, because TVA has a degree of insulation from enforcement by EPA (particularly in light of the lower court's prior ruling regarding administrative remedies, see p. 4, *supra*).

[14] To be sure, a genuine dispute between courts of appeals about the meaning or significance of particular SIP provisions might not be easily

2. Petitioners also renew their contention that even if claims for penalties would be time-barred, they should still be permitted to sue for equitable relief. The court of appeals' conclusion—that private citizens' claims for equitable relief under the CAA are subject to the same five-year limitation period specified in Section 2462—is correct, and petitioners do not identify any circuit conflict on that issue. Further review of that dependent question therefore is not warranted.

When Congress creates a private civil cause of action but does not expressly identify a limitation period or clearly specify that no time limit shall apply, it implicitly directs the federal courts to fashion an appropriate limitation period for private parties from analogous law—sometimes federal law, otherwise state law. See, *e.g.*, *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 33-35 (1995).[15] Petitioners' contention that *no* statute of limitations should apply to their equitable claims (Pet. 32) is wholly unsupported and implicates no split among the circuits.[16]

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resolved through SIP amendments, and a dispute over SIP interpretation that genuinely implicated the meaning of the underlying statutory and regulatory requirements on which SIPs are based likely could not be addressed by modifying the SIPs. In this case, however, the amendment process has already addressed the question presented, by eliminating the perceived aspect of the pre-1985 Alabama SIP on which the court of appeals based its decision.

[15] That principle is even clearer for statutes enacted after 1990. Such statutes are governed by 28 U.S.C. 1658 (Supp. V 2005), which provides a presumptive four-year limitation period for any federal statute enacted thereafter.

[16] Petitioners also point (Pet. 26-27) to the existence of separate civil-penalty and injunctive remedies in the CAA, and to a passing statement in legislative history, in support of their claim that Congress intended

The court of appeals reached the correct result by applying Section 2462's five-year limitation period to equitable claims under the CAA. In this case the court came to that conclusion by resort to the concurrent remedy doctrine. Pet. App. 22a (citing *Cope* v. *Anderson*, 331 U.S. 461, 464 (1947)). Petitioners claim that the court's reasoning was erroneous, citing various fragments of equity doctrine. But that argument for error correction is inapposite here, because the court of appeals could have reached the same result applying a straightforward "borrowing" analysis, under which the analogous federal limitation period set out in Section 2462 provides the time limit for injunctive claims. Cf. *Public Interest Research Group of N.J., Inc.* v. *Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 74-75 (3d Cir. 1990) (Clean Water Act), cert. denied, 498 U.S. 1109 (1991); *Sierra Club* v. *Chevron U.S.A., Inc.*, 834 F.2d 1517, 1520-1521 (9th Cir. 1987) (same). Any variation in the courts of appeals' *reasoning* for applying Section 2462, however, does not warrant review at this time. Petitioners fail to identify a single court of appeals that has adopted their position that citizen suits for equitable relief under the CAA (or the Clean Water Act, or any other federal statute permitting private citizens to sue both for a civil penalty and for equitable relief) are not subject to any limitation period. Nor do petitioners

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that private injunctive claims be subject to no limitation period. Those isolated indications are not the sort of plain statement that is required in order to demonstrate that Congress intended to take the unusual step of creating a private remedy with no limitation period.

point to any variation in the limitation period that does apply.[17]

Although there is some dispute in the courts of appeals concerning whether equitable claims *by the United States* can be barred by the concurrent remedy doctrine, that issue is not presented here.[18] The Eleventh Circuit correctly rejected petitioners' argument that as "private attorneys general" they are entitled to be treated as the

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[17] Petitioners cite (Pet. 25-26) several district court decisions as disagreeing with the decision of the court below. Any disagreement among district courts can be resolved in the first instance by the courts of appeals. And petitioners' cases are inapposite in any event: First, several in fact involve the United States as plaintiff. As discussed below, the Eleventh Circuit agrees that the concurrent remedy doctrine does not apply to cases brought by the government. Second, two of the cited cases involved an allegation of continuous, ongoing harm, rather than a contention that injunctive claims could reach backward in time without limit. See *Lefebvre* v. *Central Me. Power Co.*, 7 F. Supp. 2d 64, 68 (D. Me. 1998); *A-C Reorganization Trust* v. *E.I. DuPont de Nemours & Co.*, 968 F. Supp. 423, 428 (E.D. Wis. 1997). In petitioners' final case, the district court in fact applied a borrowing analysis using the principles discussed above. See *Catellus Dev. Corp.* v. *L.D. McFarland Co.*, 910 F. Supp. 1509, 1518 (D. Or. 1995). Thus, none of those decisions actually supports petitioners' proposed approach.

[18] Compare *United States* v. *Telluride Co.*, 146 F.3d 1241, 1248 (10th Cir. 1998) (rejecting "the concurrent remedy rule's application to the Government when it seeks equitable relief in its enforcement capacity"), and *United States* v. *Banks*, 115 F.3d 916, 919 (11th Cir. 1997) ("[T]he properly constructed rule is that—absent a clear expression of Congress to the contrary—a statute of limitation does not apply to claims brought by the federal government in its sovereign capacity."), cert. denied, 522 U.S. 1075 (1998), with *FEC* v. *Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (briefly concluding that Section 2462 applies to actions for injunctive relief, without addressing whether that rule applies to sovereign claims by the government), cert. denied, 522 U.S. 1015 (1997). See generally Gov't Amicus Br. at 25-33, *San Francisco Baykeeper* v. *Cargill Salt Div.*, 263 F.3d 963 (9th Cir. 2001) (No. 99-16032).

United States for time-limit purposes.[19] As the court of appeals observed, the CAA provides that citizen plaintiffs proceed "on [their] own behalf," and it does not place those plaintiffs into the government's shoes. Pet. App. 23a (quoting 42 U.S.C. 7604(a)); see also, *e.g.*, 42 U.S.C. 7604(c)(2) ("A judgment in an action under this section to which the United States is not a party shall not * * * have any binding effect upon the United States."). There is no disagreement among the circuits on that question. And petitioners have no quarrel with the Eleventh Circuit's holding that the concurrent remedy doctrine does not apply to claims truly brought by the government. Pet. App. 22a (citing *United States* v. *Banks*, 115 F.3d 916, 919 (11th Cir. 1997), cert. denied, 522 U.S. 1075 (1998)). This case therefore does not present any conflict calling for resolution by this Court.

3. Petitioners also briefly argue (Pet. 33-34) that the court of appeals erred in affirming dismissal of their NSPS claim on the ground that the pre-suit notice they provided was insufficiently specific. Certiorari is not warranted on that issue, which is closely tied to the particular facts of this case and creates no conflict on any broader legal question.

The basic legal standards governing the pre-suit notice provisions of the environmental laws are well established. "[C]ompliance with the 60-day notice provision

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[19] Absent an express statement by Congress, there is a presumption that claims by the United States are governed by no limitation period. "[A]n action on behalf of the United States in its governmental capacity * * * is subject to no time limitation, in the absence of congressional enactment clearly imposing it." *E.I. DuPont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924); accord *United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U.S. 120, 125 (1886); *United States* v. *Knight*, 39 U.S. (14 Pet.) 301, 315 (1840).

is a mandatory, not optional, condition precedent for suit," and any claim brought without the proper notice "must be dismissed." *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 26, 31 (1989); see also *id.* at 23 & n.1 (explaining that the CAA's notice provision was the model for the notice provision at issue in that case). Under EPA's regulation implementing the CAA's notice provision, a notice to an alleged violator must include, *inter alia*, "sufficient information to permit the recipient to identify the specific standard, limitation, or order which has allegedly been violated." 40 C.F.R. 54.3(b); see also 40 C.F.R. 135.3(a) (same, for Clean Water Act). The question here is whether petitioners' notice, which asserted that TVA was violating "all of the requirements of Subpart Da," Pet. App. 149a, was sufficiently specific to comply with Section 54.3(b).

Petitioners apparently do not take issue with the court of appeals' holding that an undifferentiated reference to Subpart Da *could* be insufficient to put an alleged polluter on notice of a violation pertaining only to one of the pollutants governed by that subpart.[20] Rather, petitioners suggest (Pet. 33-34) that the sufficiency of their undifferentiated notice should turn on whether, at the time they filed the complaint, they had a "good faith belief" that TVA was in violation of all of Subpart Da's requirements. Further review is not warranted on the entirely fact-bound question of petitioners' subjective good-faith belief, and petitioners identify no

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[20] The court of appeals relied for that proposition on *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481, 487 (2d Cir. 2001), a Clean Water Act case. Pet. App. 29a. The applicability of that holding on the facts of this case is open to question, but because petitioners do not address it, the issue is not presented.

conflicting authority that decides the sufficiency of notice based on those subjective grounds. In the absence of a circuit conflict, that question does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE
SUPREME COURT OF THE UNITED STATES

National Parks Conservation Association
and Sierra Club,
Petitioners,
v.
Tennessee Valley Authority,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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ARGUMENT

The petition showed that the court of appeals erred in concluding that petitioners' claims for relief in this Clean Air Act citizen enforcement action were barred under 28 U.S.C. 2462. As other courts have held, the obligation to obtain a permit under the Prevention of Significant Program is ongoing during the operation of a facility and is not somehow waived if the operator unlawfully constructs a project without a permit. The petition also showed that the court of appeals erred in any event by applying the "concurrent remedy" doctrine to invent a time-bar governing equitable relief and by holding petitioners' statutory notice inadequate as to their NSPS claims.

The brief in opposition – reconciling "competing views within the federal government," Opp. 9 n.4 – unveils an abrupt about-face from the position respondent urged throughout the lengthy proceedings in the lower courts. Much of brief (Opp. 9-19) is devoted to new arguments, similar to *petitioners'* arguments throughout this case, that the PSD statute and applicable regulations impose ongoing obligations that may be enforced even after the unlawful "construction" has taken place.

Having urged just the opposite position below, respondent now acknowledges that the Eleventh Circuit's ruling was deeply flawed. Thus, it now concedes that the court of appeals "misunderstood a number of features" of the Alabama SIP and of the "CAA scheme in which they operated" and that the "court's conclusion that these provisions did not create an ongoing obligation to comply" was "erroneous." Opp. 9.

The Government's confession of error implicates not just the reasoning of the Eleventh Circuit, but also

its judgment. Had the court of appeals accepted the position urged by petitioners – which, with the filing of the Opposition, has now become the "unified position of the federal government as a whole" (Opp. 9) – the court of appeals would have been obligated to remand the case to the district court to address the merits.

I

The Government's Confession of Error on the Ongoing Nature of PSD Violations Warrants Reversal or, at a Minimum, Vacatur of the Decision Below and Remand to the Lower Courts

The government's current position -- that PSD permit obligations are ongoing and enforceable -- represents a dramatic change from the position TVA took below. In the court below, TVA broadly argued petitioners claims were time-barred because "the relevant *act* prohibited [by the NSR provisions] is *construction,* not *operation.*" Doc. 100, at 23 (emphasis in original). Now, the government correctly acknowledges that "[t]he PSD provisions are by their terms ongoing requirements applicable to the *operation* of major emitting facilities." (Opp. 14) (emphasis added). Also below, TVA made the broad assertion that the Clean Air Act "allows citizens to sue about *construction* of a new or modified plant without a permit, not about the later *operation* of that newly constructed or modified plant." Doc. 100, at 25 (emphasis in original). The Government's Brief in Opposition directly contradicts TVA's earlier position, which the court below adopted:

> The court of appeals found that distinct language of the citizen suit provision, 42 U.S.C. 7604(a)(3), . . . signaled that Congress did not intend to allow suits based on ongoing violations during a facility's operation. Pet. App. 13a. To the contrary, 42 U.S.C. 7604(a)(1) provides precisely that remedy, as the definition contained in 42 U.S.C. 7604(f)(4) makes clear.

Opp., 16 n. 9. The two opposite positions taken by the Government in this case are reflective of the division among the lower courts over whether PSD permit and BACT obligations are enforceable after construction. *See* Pet. 17-18, 23-24.

Despite spending many pages documenting the court of appeals' many and fundamental errors, the Government nonetheless recommends (Opp.19-21) that the Court let the decision stand. But the reasons given are insubstantial. Having gone on at length about ways in which the Eleventh Circuit's analysis was fundamentally flawed, the Government's efforts to downplay the decision's inconsistency with the Sixth Circuit's analysis are tellingly strained. Thus, for example, the Government suggests the absence of a "direct" conflict between decision below and Sixth Circuit because the Eleventh Circuit's opinion "appears to be tainted by its misunderstanding of SIP and PSD operational requirements and the relationship between the PSD and Title V programs" and because the decision below "may also have been tied" to its misreading of Alabama implementation plan. Opp. 21.

Given the inter-agency disagreement this case implicates, it is not surprising that the Government – having deliberated for five months over its Brief in Opposition – seeks to minimize the Eleventh Circuit's

decision as a "narrow holding" involving a "particular provision of a single State's implementation plan." Opp. 20. But as the Government's own brief elsewhere demonstrates, the Eleventh Circuit's reasoning swept broadly, and rested upon a basic misunderstanding of the fundamentals of the relevant statutory scheme. *See, e.g.*, Opp. at 16 (court of appeals "misperceived the framework of the CAA"). As demonstrated in our petition, the question whether violations of PSD permitting requirements represent ongoing violations that may be remedied so long as the violations continue has generated significant disagreement among the lower courts (and "competing views" within the federal government, *see* Opp. 9 n.4).

The government's reasons for denying "further" review (Opp. 9) of a case in which it has just now reversed its position ring decidedly hollow. First, the Government suggests that *petitioners* are partly to blame for the Eleventh Circuit's errors because our briefs did not discuss Section 16.1.1 of the pre-1985 Alabama regulations. In fact it was TVA that led the court below astray by making the following erroneous argument regarding the pre-1985 regulations:

> [T]he PSD and NNSR regulatory programs specifically forbid only unpermitted construction. Alabama's PSD regulations are entitled "Permits to Construct in Clean Air Areas," and provide that "[n]o . . . major modification shall begin actual construction" without complying with the regulation's requirements. AAPCC Regulation 16.4.8(a) (Add. at A-5, A-14). Similarly, Alabama's NNSR regulations are entitled "Permits to Construct in or near Nonattainment Areas," and impose certain requirements that must be satisfied

> before a "Permit to Construct shall be issued to a person proposing to construct or make a major modification to a major facility." AAPCC Regulation 16.3.2(c) (Add. at A-26, A-29). Both these Alabama programs are preconstruction permit programs and not operating permit programs.

Doc. 100, at 24 (footnote omitted). In this Court, however, the Government concedes (Opp. 11) that:

> In reality * * * the Alabama SIP provisions in effect at the time of the alleged modifications in this case did contain provisions imposing an ongoing obligation to comply with PSD requirements.

In the courts below, petitioners were quite clear that it was *never* legal for TVA to be operating without a permit governing the modification. *See* Appellants' 11th Cir. Brief at 28.[1] Furthermore, because the issue is whether TVA's *current* operations are violating the law, petitioners properly focused their briefing upon demonstrating that TVA's conduct in continuing to operate equipment for which no PSD permit was granted violates the currently binding SIP language. E.g., Appellants' 11th Cir. Reply Brief at 3-6. Moreover, petitioners' briefing in the Eleventh Circuit,

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[1] Petitioners discussed Section 16.1.1 in the petition (Pet., 21-22) in order to address the Eleventh Circuit's effort to distinguish its decision from the Sixth Circuit's decision. See Pet., 18a-19a (Eleventh Circuit's erroneous assertion that the Tennessee SIP contains provision to address sources who had undertaken unpermitted modifications, but the Alabama SIP did not). Petitioners never had an opportunity to brief fully the import of the Sixth Circuit decision because it came down after the Eleventh Circuit briefs in this case were filed.

see 11th Cir. Brief at 30-32, stressed that the language and structure of the Clean Air Act's NSR's provisions unambiguously apply on an ongoing basis – the same point now made at length by the Government. Opp. 13-18. The Court should reject the Government's efforts to cast off responsibility for an Eleventh Circuit ruling that tracked the confessedly erroneous legal arguments it advanced below.

Nor should the Court credit the Government's effort to limit the significance of the Eleventh Circuit's decision. One illustration of the decision's importance is Alabama Power's amicus brief, which asserts that the Eleventh Circuit's decision was correct and defends many of the same erroneous arguments (e.g. PSD permits focus on construction, not operation, *see* Amicus Br. 9) made in a number of incorrect district court decisions that have examined this issue. Pet. 14.[2] If the decision below is left standing, other defendants will follow Alabama Power's lead and argue that it was the Eleventh Circuit, not the Sixth, that got it right. This is particularly true with respect

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[2] Alabama Power challenges petitioners' standing. Amicus Br. 15-17. The challenge is groundless. In the district court, plaintiffs moved for summary judgment, demonstrating that plaintiffs' members are injured by the dark smoke coming from TVA's stack and from poor visibility in the area where the plant is located. Doc. 177, at 15-24. Plaintiffs also submitted direct and expert testimony showing that TVA's alleged violations are related to those injuries, *id.* and that successful resolution of the case will redress those injuries. *Id.* at 24-28. The district court granted plaintiffs summary judgment on standing, a ruling that TVA did not appeal. While Article III standing questions may be raised at any time, that is not a license to advance frivolous standing challenges in an effort to influence the exercise of this Court's discretionary jurisdiction.

to the question of whether, as the Sixth Circuit found, the requirement for modified sources to have BACT emission limitations is a freestanding, ongoing obligation. *See* Pet. 23-24. Alabama Power's erroneous arguments (Br. 11-12) would apply to *any* state's PSD rule that tracks the federal provision, 40 C.F.R. § 52.21(j). *Compare* 40 C.F.R. § 52.21(j) (federal BACT provision) *with* Ala. Admin Code 335-3-14-.04(9)(c), App. 180a, *and* Tenn. Comp. R.& Regs. § 1200-3-9-.01(1)(e). Particularly given the Government's confession of error, Alabama Power's arguments in defense of the decision below tend to strengthen the case for this Court's review.

The government's suggestion (Opp. 22 n. 13) that the statute of limitations issues raised in this case will be sorted out in the future through enforcement actions brought by EPA is also groundless. The argument is belied, among other reasons, by the glacial pace at which these mammoth Clean Air Act enforcement actions have moved through the system.[3] Both this case and the companion Sixth Circuit case were filed in 2001. A similar NSR enforcement action brought by the government against Cincinnati Gas & Electric company, filed in 1999, just went to trial this month. *See United States v. PSI Energy, Inc.*, Case No. 1:99-cv-1963-LJM-JMS. Waiting for further "percolation" of issues that are already confounding the courts and dividing federal agencies is particularly undesirable for cases that take years and massive

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[3] For illustrations of the massive scope of these NSR enforcement actions, *see United States v. Ohio Edison*, 276 F. Supp. 2d 829 (S.D. Ohio 2003); *United States v. S. Indiana Gas and Elec. Co.*, 245 F. Supp. 2d 994 (S.D. Ind. 2003).

resources to investigate and litigate.

The Government's suggestion that this Court overlook the errors below is also surprising given the enormous environmental and public health significance of the alleged modifications at issue in this case See Opp. 5. For example, Unit 5 at Colbert, because it has *no relevant pollution controls*, emitted a staggering 35,000 tons of sulfur dioxide in 2003. Pet. 9. By way of comparison, the Clean Air Act defines a "major source" as one emitting at least 100 tons a year, 42 U.S.C. § 7479. If petitioners prevail in this case, the new emission limits imposed for this facility will reduce the plant's sulfur dioxide emissions by over 90 percent. *See* Pet. 6. Allowing this erroneous decision to stand would not only leave in place a fundamentally flawed judgment based upon legal theories the Government now acknowledges to be incorrect, but would also allow the subject facilities to continue to emit air pollutants at levels that threaten public health and welfare.

The Government's position that the Court should leave the acknowledged and fundamental errors of the lower court unremedied becomes all the more peculiar – and redolent of a jury-rigged compromise between competing federal agencies – when one recalls that EPA itself identified the facility at issue as warranting enforcement action, *see* Opp. 4, and that, as the Opposition acknowledges, "TVA has a degree of insulation from enforcement by EPA." Opp. 22 n.13.

Given the importance of this case; and the mischief that will ensue if the Eleventh Circuit's decision is allowed to stand; and the Government's thoroughly-explained confession of error, this case is ripe for summary disposition under Rule 16.1. The Eleventh

Circuit's judgment should be summarily reversed, and the case remanded for further proceedings. If the Court concludes, however, that the Eleventh Circuit's analysis – now defended only in Alabama Power's amicus brief – merits further consideration, then the Court should grant plenary review.

At a minimum, the Solicitor General's confession of error on a matter essential to the judgment merits vacatur of the decision below and remand for the lower court to consider the United States' (and perforce TVA's) new position. *See, e.g.*, *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (citing cases in which this Court has granted, vacated and remanded in light of "confessions of error or other positions newly taken by the Solicitor General"); *Stutson v. United States*, 516 U.S. 163, 183 (1996) (noting that practice of GVRing upon confession of error by the Solicitor General is "well entrenched") (Scalia, J., dissenting); Robert L. Stern, *et al.* SUPREME COURT PRACTICE at 317-18 (8th ed. 2002) (citing other cases in which court has "GVR'd" based upon confessions of error or changes of position by the Solicitor General).

II

If the Court Grants Plenary Review on the Ongoing Violation Question, it Should Also Review the Eleventh Circuit's Erroneous Application of the Concurrent Remedy Doctrine and its Misreading of the CAA's Notice Requirement

If the Court grants review and sets this matter for full consideration, then the concurrent remedy issue should also be considered. (The issue would need to be

addresssed only if the Court were conclude, like the Eleventh Circuit, that the violations here were not ongoing).

The government's argument that the Eleventh Circuit's decision could be upheld through a "borrowing" analysis is incorrect. Opp. 24. The government failed to identify any statute that could be "borrowed" that would bar petitioners' claims for injunctive relief. The cases cited by the Government are also inapposite.[4] Indeed, the Government's "borrowing" point is contradicted by its own brief (Opp. 18), which analogizes petitioners' claims to temporary nuisance claims, claims not subject to statutes of limitations. *See* Pet. 31.

In *United States v. Telluride*, 146 F.3d 1241 (10th Cir. 1998), cited at Opp. 26, the government successfully urged the very same argument regarding the inapplicability of the concurrent remedy doctrine that petitioners advance here. *See* Brief of Petitioner-Appellant in No. 97-1236 at 27-39 (10th Cir. Sept. 2, 1997). Under the government's argument in *Telluride*, the concurrent remedy doctrine would not bar injunctive relief regardless of whether the plaintiff is the United States or a private attorney general. Accordingly, given the Eleventh Circuit's failure to follow the precedents of this Court in applying the concurrent remedy doctrine, and given that its

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[4]L The two cases cited in the Government's brief, *Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 74-75 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); and *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1520-1521 (9th Cir. 1987), have nothing to do with applying a limitations period to bar claims for injunctive relief.

incorrect analysis could be applied to *any* action for injunctive relief, *see, e.g., Federal Election Commission v. Christian Coalition,* 965 F. Supp. 66, 70-72 (D.D.C. 1997), review should be granted.

Finally, if the Court grants plenary consideration, it should grant review of the Eleventh Circuit's ruling upholding the dismissal of petitioners NSPS claims for alleged inadequacy of notice. While perhaps not independently cert-worthy, the issue is of enormous practical significance. Here, in the notice letter, plaintiffs stated their good-faith belief that TVA, which to this day refuses to acknowledge that Colbert Unit 5 is even subject to NSPS regulations, was violating all of the requirements of Subpart Da. Plaintiffs complaint matched the notice letter in this regard. Subsequently, during the course of discovery, plaintiffs learned that Colbert 5 is managing to comply with some Subpart Da requirements, though it has never complied with the sulfur dioxide control requirements. The Eleventh Circuit's ruling goes far beyond the scope of the regulations, which only requires that a defendant be given sufficient notice from which sufficient information to permit the recipient to identify the specific standard, limitation, or order which has allegedly been violated. 40 C.F.R § 54.3. The regulations are not so hyper-technical that they require a claim to be dismissed because plaintiffs made a good-faith error regarding the scope of a defendant's violations – errors that are almost inevitable for private plaintiffs with little or no access to the alleged violator's facilities and emissions information.

CONCLUSION

The petition for a writ of certiorari should be granted.

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TENNESSEE VALLEY AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* ALABAMA POWER COMPANY IN SUPPORT OF TENNESSEE VALLEY AUTHORITY

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IN THE

Supreme Court of the United States

No. 07-867

NATIONAL PARKS CONSERVATION ASSOCIATION, *et al.*,
Petitioners,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* ALABAMA POWER COMPANY IN SUPPORT OF TENNESSEE VALLEY AUTHORITY

INTERESTS OF *AMICUS CURIAE*

Alabama Power Company ("Alabama Power") supplies power to more than 1.3 million homes and businesses in the southern two-thirds of Alabama.[1] Its

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Alabama Power's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

power generation and transmission system is interconnected with the Tennessee Valley Authority ("TVA") system in northern Alabama. This interconnection allows for the exchange of power between the two systems and provides economic and reliability benefits, such as the ability to respond to emergency conditions.

The specific allegations raised in this case were first made against TVA by the United States Environmental Protection Agency ("EPA") in 1999 by way of an Administrative Compliance Order ("ACO"). At that time, TVA, Alabama Power, and others filed petitions for review in the United States Court of Appeals for the Eleventh Circuit challenging the ACO. *Tenn. Valley Auth. v. Envtl. Prot. Agency*, 278 F.3d 1184, 1205-07 (11th Cir. 2002). The court of appeals held that Alabama Power had standing to challenge the ACO because of "the interconnectedness of their electric transmission networks with TVA's." *Id.* at 1206. On the merits, the court of appeals found the ACO to be "legally inconsequential" and held that TVA was "free to ignore the ACO without risking the imposition of penalties for noncompliance with its terms." *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1240 (11th Cir. 2003). When a petition for writ of certiorari was filed, Alabama Power was among the parties that urged this Court to deny the petition, which it did. *Leavitt v. Tenn. Valley Auth.*, 541 U.S. 1030 (2004). When Petitioners here filed this citizen suit parroting the allegations in EPA's earlier ACO, Alabama Power again participated to protect its interests, this time as *amicus curiae* at the court of appeals.

In addition to these interests, Alabama Power itself operates coal-fired power plants in Alabama and is a

defendant in a case pending in the United States District Court for the Northern District of Alabama involving allegations similar to those here. *United States v. Ala. Power Co.*, No. 2:01-cv-00152-VEH (N.D. Ala.). In that case (filed in 2001), EPA alleges that Alabama Power made "major modifications" to four of its facilities, the last of which allegedly commenced in 1993, outside the five-year statute of limitations at issue in this case. As here, EPA does not allege that Alabama Power is violating or has violated any of the emission limitations in its state-issued operating permits, only that Alabama Power should have sought pre-construction permits from the state of Alabama prior to starting the work in question. Thus, the same Alabama regulations at issue here are at issue in the case against Alabama Power, and the court of appeals' ruling is of significant interest to Alabama Power.

Finally, Alabama Power respectfully submits that this *amicus curiae* brief is particularly important given TVA's unique independent status and the Department of Justice's role in practice before this Court. Although TVA represented itself and presented its position in the proceedings below based on its independent litigating authority,[2] Alabama Power understands that TVA has been prevented by the Department of Justice from continuing to do so in this case and that the Solicitor General will instead file a brief in response to the petition.[3] This will likely result in some change of the position presented on behalf of TVA. While Alabama Power does not know what arguments the Department of Justice will

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[2] *See Tenn. Valley Auth.*, 278 F.3d at 1193-98.

[3] *See* 28 U.S.C. § 518(a); 28 C.F.R. § 0.20(a).

make in response to the petition, this inter-agency process will likely dilute the adversarial nature of this case, making this *amicus curiae* brief essential to sharpening the presentation of the issues to this Court.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

In the appendix to their petition, Petitioners include some of the relevant provisions of the Alabama State Implementation Plan ("SIP") but fail to include others. Additional relevant provisions of the Alabama SIP are included in an appendix to this brief and are cited herein.

SUMMARY OF THE ARGUMENT

There is no "split" between the Eleventh and Sixth Circuits regarding the five-year statute of limitations in 28 U.S.C. § 2462. Those two circuits reached different results in separate cases involving TVA because of differences in the underlying state laws, not because of any disagreement on an overarching issue of federal law. Further, the Eleventh Circuit correctly applied 28 U.S.C. § 2462 to Petitioners' claims alleging violations of the Alabama SIP in connection with work TVA performed in 1982 and 1983. Petitioners' remaining arguments for review—that the court of appeals somehow erred in applying the concurrent remedy doctrine and the pre-suit notice requirement—also involve no conflict among the circuits nor any important issue of federal law. Finally, there are unresolved issues with respect to Petitioners' standing that would complicate review by this Court.

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT IN THE CIRCUITS OR IMPORTANT QUESTION OF FEDERAL LAW WARRANTING CERTIORARI

Petitioners seek review by this Court to correct what they see as a "widespread, disparate, and often erroneous application of 28 U.S.C. § 2462 in environmental enforcement cases," which they say is reflected in a "split between the Sixth and Eleventh Circuits." Pet. at 13 (capitalization omitted). This so-called "split" is based on Petitioners' comparison of the Eleventh Circuit's decision here with the earlier decision of the Sixth Circuit in *National Parks Conservation Association v. Tennessee Valley Authority*, 480 F.3d 410 (6th Cir. 2007). *Id.* These two circuits' decisions, however, interpreted and applied different ***state laws*** that led those courts to different outcomes. There simply is no split "on the same important matter" and no "important question of federal law" justifying this Court's review. Sup. Ct. R. 10(a), (c).

Indeed, the Eleventh and Sixth Circuits actually agreed on the overarching federal issue—*i.e.*, whether the five-year statute of limitations in 28 U.S.C. § 2462 applied to the alleged SIP violations before them. *Nat'l Parks Conservation Ass'n*, 480 F.3d at 416 ("We hold that § 2462's five-year statute of limitations applies."); Pet. App. at 11a ("Legal claims brought under the Clean Air Act are subject to the general federal five-year statute of limitations established by 28 U.S.C. § 2462 . . . ."). The different outcomes in the two cases were driven by differing aspects of the Alabama and Tennessee SIPs. The Sixth Circuit found that the Tennessee SIP imposed on sources "an ongoing duty to ensure that they obtain the appropriate emissions limitations in their con-

struction permits, even if they failed to do so before construction." *Nat'l Parks Conservation Ass'n*, 480 F.3d at 413 (citing Tenn. Comp. R. & Regs. § 1200-3-9-01(1)(e)). Conversely, the Eleventh Circuit found that the Alabama SIP contained no "analogous provision" and that "[u]nlike Tennessee, Alabama limited the obligation to apply Best Available Control Technology to proposed modifications, with no caveat continuing the obligation for the operating life of the source if it was not met during the construction phase." Pet. App. at 19a; *see also id.* at 17a ("A careful review of *Alabama's* preconstruction permitting program reveals that Best Available Control Technology was to be determined and installed at the time of construction.") (emphasis added). This "important difference in the states' plans," the Eleventh Circuit concluded, "ultimately precludes us from reaching the same result as our sister circuit." *Id.* at 18a-19a.[4]

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[4] Petitioners also point to different results in district court cases, some involving SIP claims and some not. Pet. 13-14. But it is well understood by district courts, and requires no clarification from this Court, that the application of 28 U.S.C. § 2462 in the context of a SIP claim requires an analysis of the underlying SIP that is alleged to have been violated. For example, after the Sixth Circuit's decision, the United States District Court for the Eastern District of Kentucky addressed the application of 28 U.S.C. § 2462 to alleged violations of the Kentucky SIP. *United States v. East Ky. Power Co-Op, Inc.*, 498 F. Supp. 2d 970 (E.D.Ky. 2007). The district court there had no difficulty applying the same well-established principles applied by the Sixth Circuit and the Eleventh Circuit to the specific provisions of the Kentucky SIP. *Id.* at 974-75. Petitioners do not cite the *East Kentucky Power* decision in their litany of district court decisions on 28 U.S.C. § 2462. Pet. at 13-14. The decision underscores the state-specific nature of the inquiry when the underlying claim is based on a SIP and the fact that

That Alabama and Tennessee take a somewhat different approach to construction permitting under their respective SIPs is entirely consistent with the cooperative federalism approach adopted by Congress in the Clean Air Act. Under the Act, Congress gave the states the primary responsibility of regulating air pollution from facilities within their borders. *See* 42 U.S.C. § 7401(a)(3) ("Air pollution prevention . . . is the primary responsibility of States and local governments."); *id.* § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State."). While EPA's job is to promulgate air quality standards for certain pollutants and to ensure that the minimum requirements for control programs are met, *id.* § 7409, the states are responsible for deciding how to achieve those standards and requirements within their own borders through EPA-approved SIPs. *Id.* § 7410(a); *Envtl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1428 (2007) ("The Clean Air Act Amendments of 1970 . . . directed EPA to devise National Ambient Air Quality Standards (NAAQS) limiting various pollutants, which the States were obliged to implement and enforce . . . ."); *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 78-79 (1975). The statutory New Source Review ("NSR") program adopted by Congress in 1977 continued the basic cooperative federalism approach in the Act. *See Ala. Power Co. v. Costle*, 636 F.2d 323, 349-51 (D.C. Cir. 1980) ("The 1977 Amendments maintain the basic structure of regulation of stationary sources through state plans."); *cf. Alaska Dep't of Envtl. Conservation v. Envtl. Prot. Agency*, 540 U.S. 461, 491 (2004) (describing the PSD program

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no further review is warranted with respect to the Eleventh Circuit's analysis of the particulars of the Alabama SIP.

as a regulatory "scheme that 'places primary responsibilities and authority with the States, backed by the Federal Government.'" (quoting S. Rep. No. 95-127, p. 29)).

In accordance with this congressional intent, Alabama and Tennessee have fulfilled their cooperative roles. Both states have adopted SIPs, which were approved by EPA.[5] Both of those SIPs meet the minimum federal requirements, but (key to this case) they are not identical. The federal courts of appeals with jurisdiction for each state have interpreted the pre-construction permitting provisions of each SIP vis-à-vis 28 U.S.C. § 2462 and have reached different results based on the differences in those SIPs. This is not a conflict; it is how Congress designed the process. If Petitioners believe that differences in the Alabama and Tennessee SIPs make one or both of the SIPs deficient, their recourse is to petition EPA for a "SIP call" requiring correction of the perceived deficiency,[6] not review by this Court exploring the intricacies of various state permitting schemes.

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[5] Both Alabama's and Tennessee's SIP were first approved by EPA on May 31, 1972. 37 Fed. Reg. 10,842, 10,847, 10,894 (May 31, 1972). The NSR provisions of the Alabama SIP were approved effective December 10, 1981, and the NSR provisions of the Tennessee SIP were approved effective March 28, 1985. 46 Fed. Reg. 55,517 (Nov. 10, 1981) (Alabama); 50 Fed. Reg. 7,777 (Feb. 26, 1985) (Tennessee).

[6] If the EPA determines that a SIP is "substantially inadequate," it may issue a "SIP call" to the offending state, requiring the state to revise its SIP to correct the inadequacies. 42 U.S.C. § 7410(k)(5).

II. THE COURT OF APPEALS CORRECTLY APPLIED THE ALABAMA SIP

The court of appeals' application of 28 U.S.C. § 2462 to Petitioners' claims under the Alabama SIP is wholly unremarkable and merits no further review. The court of appeals' starting point was the universally accepted principle that a "claim first accrues on the date that a violation first occurs." Pet. App. at 11a. The court looked to the nature of Petitioners' claim (that TVA should have sought a pre-construction permit before the 1982 and 1983 work in question) and the legal basis for it (the Alabama SIP) to determine when the claim first accrued and whether Petitioners' complaint, filed twenty years later, was timely. *Id.* at 15a-20a.

In doing so, the court of appeals correctly applied the requirements of the Alabama SIP to Petitioners' claims. Under the Alabama SIP (as well as the Clean Air Act itself), a source is obligated to seek a pre-construction permit as a "prerequisite" to starting construction. *Id.* at 17a; *see also Envtl. Def.*, 127 S. Ct. at 1429 ("The 1977 amendments required a PSD permit before a 'major emitting facility' could be 'constructed.'"); 42 U.S.C. § 7475(a) ("No major emitting facility . . . may be constructed . . . unless" certain requirements are met.). Thus, a claim for failing to obtain such a permit accrues at the time construction begins without it. Pet. App. at 18a. This is reflected in the citizen suit provision that forms the basis for Petitioners' lawsuit, which is phrased entirely in the present tense. That provision creates a claim "against any person who *proposes to construct or constructs*" without a permit, but it does not retroactively create a claim against a person who "has constructed" without the required permit at some time in the distant past. 42 U.S.C.

§ 7604(a)(3) (emphasis added); *see also* Pet. App. at 13a. Similarly, the enforcement provision of Part C of the Clean Air Act contemplates that EPA or state enforcement officers will "take such measures, including issuance of an order, or seeking injunctive relief, as necessary *to prevent* the construction or modification of a major emitting facility which does not conform to the requirements of this part." 42 U.S.C. § 7477 (emphasis added). Thus, all around, the Clean Air Act contemplates enforcement of pre-construction permitting requirements *at the time of construction*.

Petitioners do not dispute this. Instead, they argue that the obligation to seek a determination from the state as to the Best Available Control Technology ("BACT") (which is one aspect of pre-construction permitting) continues indefinitely because they say "the BACT requirement in the SIP stands on its own" and thus "each day TVA operates [] without BACT emission limits is a new violation . . . ." Pet. at 24. As support, Petitioners cite to Alabama Administrative Code subsections 335-3-14-.01(1)(a) and (c), which they say "explicitly state[]" "the prohibition against operation without an NSR permit." Pet. at 19-20. This argument is flawed because it contradicts the plain language of the Alabama SIP (both at the time of TVA's work and now).

First, Petitioners mischaracterize the meaning and import of Alabama Administrative Code subsections 335-3-14-.01(1)(a) and (c). These subsections are not—either explicitly or implicitly—a "prohibition against operation without an NSR permit," as Petitioners assert. Pet. at 19. Subsections (a) and (c) of rule 335-3-14-.01(1), quite plainly, prohibit operation of certain pollutant-emitting equipment without an "Air Permit." An "Air Permit" under the Alabama SIP is not "an

NSR permit." An "Air Permit" is the generic permit that a source must have to operate pollutant-emitting equipment in Alabama, and such a permit may or may not include NSR-related requirements. *See* Ala. Admin. Code r. 335-3-14-.01(1)(a). NSR requirements are addressed in a different section of the Alabama SIP. *See* Ala. Admin. Code r. 335-3-14-.04(1)(b) ("No new major stationary source or major modification to which the requirements of paragraphs (9) through (17)(c) of this rule apply shall begin construction without a permit that states that the major stationary source or major modification will meet those requirements."). In the present case, Petitioners did not accuse TVA of operating without an Air Permit; in fact, it is undisputed that TVA did have an Air Permit. Pet. App. at 20a-21a. Instead, as the court of appeals rightly recognized, Petitioners accused TVA of having "the wrong" Air Permit, which is a collateral attack well past its time. Pet. App. at 21a (citing *United States v. AM Gen. Corp.*, 34 F.3d 472, 475 (7th Cir. 1994)).

Second, an analysis of the actual NSR provisions of the Alabama SIP shows that BACT is by definition not an independent, ongoing requirement.[7] BACT for a

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[7] Beyond the Alabama SIP, Petitioners strain to make the Clean Air Act impose some kind of ongoing obligation to seek a BACT determination that would give rise to "new" and "continuous" violations every day the plant is operated. The plain terms of the statute do not support this. As explained above, the Clean Air Act requires a pre-construction determination of BACT for a specific construction or modification project. *See* 42 U.S.C. § 7475(a). BACT is therefore wholly tied to a particular construction or modification project and does not arise in any other context. Petitioners point to the phrase "as a condition of operations" in 42 U.S.C. § 7604(f)(4) to try to cobble together an argument that BACT is an independent emission limitation that can serve as the basis for a citizen suit decades after the original construction or modification. Pet. at 17-18. Petitioners' inter-

source does not exist until it is determined by the Director "on a case-by-case basis" for a particular project *before* construction begins. Ala. Air Pollution Control Comm'n Reg. 16.4.2(l) (emphasis added) (presently codified at Ala. Admin. Code r. 335-3-14-.04(2)(l)); *see also* Ala. Air Pollution Control Comm'n Reg. 16.4.8(a) (presently codified as Ala. Admin. Code r. 335-3-14-.04(8)(a)) (providing that "[n]o major stationary source or major modification shall begin actual construction unless" BACT is determined). BACT is determined for "each *proposed* emissions unit" where a net emissions increase "*would* occur." Ala. Air Pollution Control Comm'n Reg. 16.4.9(c) (emphasis added) (presently codified at Ala. Admin. Code r. 335-3-14-.04(9)(c)). Moreover, the inputs to the BACT process are based on a snapshot assessment for a particular construction project taken before the project begins. For example, establishing BACT requires a "[p]reapplication . . . analysis of ambient air quality in the area" that includes "continuous air quality monitoring data . . . gathered over a period of at least one (1) year . . . represent[ing] the year *preceding* receipt of the application." Ala. Air Pollution Control Comm'n Reg. 16.4.12(a) (emphasis added) (presently codified at

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pretation wrenches the statutory language out of context. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). The phrase "as a condition of operations" does not even refer to NSR permits (which are mentioned expressly in the preceding subsection). Moreover, the purpose of § 7604 is to delineate the scope of citizen suit jurisdiction in general, not to define BACT as anything other than a pre-construction requirement. Section 7604 certainly is not designed to extend a source's obligation to seek a determination of BACT decades after a construction or modification project has begun.

Ala. Admin. Code r. 335-3-14-.04(12)(a)). Based on this analysis and other contemporaneous data, the Director determines the appropriate degree of emission reduction that is achievable "through application of production processes or available methods." Ala. Air Pollution Control Comm'n Reg. 16.4.2(l) (presently codified at Ala. Admin. Code r. 335-3-14-.04(2)(l)).

Thus, given the indisputable *pre*-construction nature of the BACT analysis and the contemporaneous information that is necessary to determine it in a given case, it is particularly appropriate to apply the five-year statute of limitations to BACT-related claims. *See Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) ("Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.") (internal quotations omitted). As this Court has observed in the BACT context, "EPA itself regards it as 'imperative' to act on a timely basis, recognizing that courts are 'less likely to require new sources to accept more stringent permit conditions the farther planning and construction have commenced.'" *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 495.

That logic applies here with full force. It is undisputed that TVA had a valid permit to operate its Colbert Plant. Pet. App. 3a, 7a; Doc. 171, Ex. 14-16.[8] It is further undisputed that TVA's 1982 and 1983 work was the subject of media scrutiny and public notices and that TVA provided Petitioner Sierra Club with

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[8] "Doc." citations are to the documents in the district court record.

actual notice of its intentions. Doc. 101, Ex. 10, 11, 14-17, 21, 22. Had Petitioners perceived some violation or shortcoming, they had five years to complain. They did not. The court of appeals rightly held that their complaint—filed twenty years later—was time-barred by 28 U.S.C. § 2462.

III. THE COURT OF APPEALS' APPLICATION OF THE CONCURRENT REMEDY DOCTRINE AND THE PRE-SUIT NOTICE REQUIREMENT DOES NOT WARRANT FURTHER REVIEW

Petitioners' remaining arguments for review are unavailing. First, Petitioners distort the decision below when they say the court of appeals "rul[ed] that section 2462 bars petitioners' claims for injunctive relief." Pet. at 25. The court of appeals did no such thing. While it is true that 28 U.S.C. § 2462 can bar certain forms of non-monetary relief,[9] that was not the court of appeals' holding here. The court expressly held: "By its plain language, the statute of limitations set forth in 28 U.S.C. § 2462 applies only to claims for legal relief; it does not apply to equitable remedies." Pet. App. at 22a.

Petitioners' real gripe is not with the "Eleventh Circuit's judge-made expansion of Section 2462," Pet. at 26, but with the court's application of the concurrent remedy doctrine to their claims. And while Petitioners

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[9] *See Coghlan v. Nat'l Transp. Bd.*, 470 F.3d 1300, 1305 (11th Cir. 2006) (holding that "a 'penalty,' as the term is used in § 2462, is a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action.") (quoting *Johnson v. Sec. & Exch. Comm'n*, 87 F.3d 484, 488 (D.C. Cir. 1996)).

complain that the court of appeals' "ruling barring their claims for injunctive relief . . . contravenes the decisions of this Court," Pet. at 25 (capitalization omitted), they fail to point out, much less discuss, any such "decisions." The truth is the court of appeals contravened no decision of this Court. Rather, it followed and applied the Court's decision in *Cope v. Anderson*, 331 U.S. 461 (1947), to the facts before it. This is something that has been done by other circuits, too, and is no basis for further review. *See, e.g., Fed. Election Comm'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996), *cert. denied*, 522 U.S. 1015 (1997) (holding that federal government's claims for injunctive relief were barred because, per *Cope*, "equity will withhold its relief . . . where the applicable statute of limitations would bar the concurrent legal remedy").

Second, Petitioners' argument that the court of appeals erred in affirming the dismissal of their New Source Performance Standards ("NSPS") claims for failure to provide adequate pre-suit notice is a flimsy basis for this Court's review. Petitioners point to no decision of this Court or any other court that contradicts the court of appeals' decision on this point. The decision to affirm was based entirely on the particulars of Petitioners' shotgun notice letter to TVA, not on any point of law. Pet. App. at 29a-30a. Further review of this holding is not appropriate or warranted.

IV. PETITIONERS HAVE A STANDING PROBLEM

Petitioners say that "the district court granted Petitioners' motion for partial summary judgment on standing, and TVA did not appeal that ruling." Pet. at 10. That is not entirely true. In point of fact, the district court only granted *in part* Petitioners' motion

for partial summary judgment on standing and *only* with respect to "visibility impairment / opacity."[10] Doc. 202 at 9. The district court *denied* Petitioners' motion on standing "as to other emissions." *Id.*[11]

This is an important distinction that impacts the ultimate justiciability of this case. As the court of appeals noted, Petitioner Sierra Club filed a "*separate* suit alleg[ing] that TVA's operations at the Colbert Plant repeatedly violated the 20% opacity limitation . . . during the five-year period from 1997 to 2002." Pet. App. at 6a (emphasis added). The district court considered consolidating that separate opacity suit with the present case, but decided against it. Pet. App. at 9a. Thus, while Petitioners' may have established their standing for that separate opacity suit, their standing "as to other emissions" has not been established.

Further, the district court expressed concern about whether Petitioners would ultimately be able to prove standing based on alleged health effects to their members or damage to their property. Doc. 202 at 7. The district court cautioned Petitioners that it "would expect, after appropriate investigation, the dismissal of claims

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[10] "The term 'opacity' refers to the extent to which a plume of smoke 'reduce[s] the transmission of light and obscure[s] the view of the background.'" *Sierra Club v. Tenn. Valley Auth.*, 430 F.3d 1337, 1341 (11th Cir. 2005) (quoting Ala. Admin. Code r. 335-3-1-.02(1)(tt)). Opacity is not itself a pollutant; it is a condition. *Id.*

[11] Petitioners are also incorrect to suggest that TVA concedes their standing. In its briefing at the court of appeals, TVA argued that Petitioners lack standing to pursue their NSPS claims related to sulfur dioxide. Principal Br. of TVA, No. 06-10729, at 57 (11th Cir. June 19, 2006). In any case, standing is jurisdictional. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).

or parties whose legal theories or purported facts are not supported." *Id.* Additional questions were raised by the district court about Petitioners' "ability to prove causation regarding Colbert Unit 5" and whether they will be able to "link causation between the 1982 work at Colbert 5 and the claimed injuries." *Id.* at 9. *See Lujan*, 504 U.S. at 560 (holding that a "causal connection between the injury and the conduct complained of" is an "irreducible constitutional minimum"). Petitioners submitted no further relevant evidence supporting their standing after these questions were raised. Thus, there is doubt about whether Petitioners have demonstrated their standing with the necessary level of proof for this stage of the litigation and whether they could carry their ultimate burden of proof at trial. *See id.* at 561 ("[Standing elements] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, [and] each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.").

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

Alabama State Implementation Plan

Alabama Air Pollution Control Commission Reg. 16.4.2(l)

Definitions.

For the purposes of this Part only, the following terms will have meanings ascribed in this Section:

* * * * *

(l) "Best Available Control Technology ("BACT")" shall mean an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under the CAA which would be emitted from any proposed major stationary source or major modification which the Director, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of BACT result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR 60 and 61. If the Director determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof may be pre-

scribed instead to satisfy the requirement for the application of BACT. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice, or operation and shall provide for compliance by means which achieve equivalent results.

Alabama Air Pollution Control Commission Reg. 16.4.8(a)

Review of Major Stationary Sources and Major Modifications – Source Applicability and Exemptions.

(a) No major stationary source or major modification shall begin actual construction unless, as a minimum, requirements contained in Sections 16.4.9 through 16.4.17 of this Part have been met.

Alabama Air Pollution Control Commission Reg. 16.4.9(c)

Control Technology Review.

* * * * *

(c) A major modification shall apply BACT for each pollutant subject to regulation under the CAA for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

Alabama Air Pollution Control Commission Reg. 16.4.12(a)

Air Quality Analysis.

(a) Preapplication Analysis.

(1) Any application for a permit under this Part shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(i) For the source, each pollutant that it would have the potential to emit in a significant amount;

(ii) For the modification, each pollutant for which it would result in a significant net emissions increase.

(2) With respect to any such pollutant for which no NAAQS exists, the analysis shall contain such air quality monitoring data as the Director determines is necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

(3) With respect to any such pollutant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maximum allowable increase.

(4) In general, the continuous air quality monitoring data that is required shall have been gathered over a period of at least one (1) year and shall represent the year preceding receipt of the application, except that, if the Director deter-

mines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one (1) year (but not to be less than four (4) months), the data that is required shall have been gathered over at least that shorter period.

(5) For any application which becomes complete, except as to the requirements of Subparagraphs (a)(3) and (4) of this Section, between June 8, 1981, and February 9, 1982, the data that Subparagraph (a)(3) of this Section requires shall have been gathered over at least the period from February 9, 1981, to the date the application becomes otherwise complete, except that:

(i) If the source or modification would have been major for that pollutant under 40 CFR 52.21 as in effect on June 19, 1978, any monitoring data shall have been gathered over at least the period required by those regulations.

(ii) If the monitoring data would relate exclusively to ozone and would not have been required under Federal PSD regulations as in effect on June 19, 1978, the Director may waive the otherwise applicable requirements of Subparagraph (a)(5) of this Section to the extent that the applicant shows that the monitoring data would be unrepresentative of air quality over a full year.

(6) The owner or operator of a proposed stationary source or modification of VOC who satisfies all conditions of Section 16.3.2 may provide post-approval monitoring data for ozone in lieu of providing preconstruction data as required under Paragraph (a) of this Section.

Ala. Admin. Code Rule 335-3-14-.04(2)(l) (current)

(2) Definitions.

For the purposes of this rule only, the following terms will have meanings ascribed in this paragraph:

* * * * *

(l) "Best Available Control Technology (BACT)" shall mean an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each regulated NSR pollutant which would be emitted from any proposed major stationary source or major modification which the Director, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of BACT result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR 60 and 61. If the Director determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof may be prescribed instead to satisfy the requirement for the application of BACT. Such standard shall, to the degree possible, set forth

the emissions reduction achievable by implementation of such design, equipment, work practice, or operation and shall provide for compliance by means which achieve equivalent results.

Ala. Admin. Code Rule 335-3-14-.04(8)(a) (current)

(8) Review of Major Stationary Sources and Major Modifications – Source Applicability and Exemptions.

(a) No major stationary source or major modification shall begin actual construction unless, as a minimum, requirements contained in paragraphs (9) through (17) of this rule have been met.

Ala. Admin. Code Rule 335-3-14-.04(12)(a) (current)

(12) Air Quality Analysis.

(a) Preapplication Analysis.

1. Any application for a permit under this rule shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(i) For the source, each pollutant that it would have the potential to emit in a significant amount;

(ii) For the modification, each pollutant for which it would result in a significant net emissions increase.

2. With respect to any such pollutant for which no NAAQS exists, the analysis shall contain such air quality monitoring data as the Director determines is necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

3. With respect to any such pollutant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maximum allowable increase.

4. In general, the continuous air quality monitoring data that is required shall have been gathered over a period of at least one (1) year

and shall represent the year preceding receipt of the application, except that, if the Director determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one (1) year (but not to be less than four (4) months), the data that is required shall have been gathered over at least that shorter period.

5. Reserved.

6. The owner or operator of a proposed stationary source or modification of VOC who satisfies all conditions of rule 335-3-14-.05 may provide post-approval monitoring data for ozone in lieu of providing preconstruction data as required under subparagraph (a) of this paragraph.

7. For any application that becomes complete, except as the requirements of subparagraphs (a)3. and 4. of this paragraph pertaining to PM10, after December 1, 1988 and no later than August 1, 1989 the data that subparagraph (a)3. of this paragraph requires shall have been gathered over at least the period from August 1, 1988 to the date the application becomes otherwise complete, except that if the Director determines that a complete and adequate analysis can be accomplished with monitoring data over a shorter period (not to be less than 4 months), the data that subparagraph (a)3. of this paragraph requires shall have been gathered over that shorter period.

8. With respect to any requirements for air quality monitoring of PM10 under subparagraphs (8) (k) and (l) of this rule, the owner or operator of the source or modification shall use

a monitoring method approved by the Director and shall estimate the ambient concentrations of PM10 using the data collected by such approved monitoring method in accordance with estimating procedures approved by the Director.